IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

Nos. 341-342

B. I. SALINGER, JR., APPELLANT,

vs.

VICTOR LOISEL, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA, *et al.*,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR APPELLANT.

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Attorney for Appellant.

ST. CLAIR ADAMS,
L. H. SALINGER,
On Brief.

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STATUS.

No. 341 and No. 342 are here argued. They involve resistance by habeas corpus to an attempt to remove appellant to the District of South Dakota to answer an indictment there returned which charges violation of Section 215, Penal Code. A bond was given that appellant would appear before the District Court of the United States for that district at its then next sitting at Sioux Falls. The sureties surrendered appellant while he was in New Orleans to a United States Commissioner there and thereupon that officer placed appellant in the custody of the respondent marshal. Upon this, appellant obtained a writ of habeas corpus from the District Court of the United States for the Eastern District of Louisiana. He gave bond to appear at hearing in that court.

A few days later complaint under Section 1014 R. S. and based on said indictment was lodged with said commissioner, and thereunder that officer once more put appellant in the custody of said marshal. A second writ was obtained from said District Court. The two habeas corpus proceedings are, respectively, 17233 and 17238 on the docket of said court. The two proceedings were submitted on a single hearing and the resistances are identical, but there was no consolidation. Both writs were dismissed. Hence, the appeals in Nos. 341 and 342. In both cases said District Court allowed appeals to this court with order that the appeal operate as a *supersedeas* upon the giving of an appeal bond and another "in the nature of a supersedeas bail bond." Both were given as ordered. Despite that said appeals had been perfected, the judge of said court ordered removal. Thereupon a third writ was obtained of said court, and that proceeding is No. 17242. The resistance in this last is identical with that in the first two, except that in the last there was added the complaint that the perfecting said two appeals left the judge without authority to order removal during the pendency of the appeals. This last writ was also dismissed and appellant was put in custody of said marshal. Appellant then obtained allowance of appeal and a supersedeas from the Circuit Court of Appeals of the Fifth Circuit. That appeal has been heard and an opinion filed dismissing said third writ. The said appeal has been removed here by certiorari and in number 705.

NOTE: As the printed transcript in number 342 contains nearly all the record in numbers 341 and 705, page references are to the transcript, in No. 342 unless otherwise specified.

STATEMENT OF THE CASE.

Said indictment was returned on March, 1922, in the Western Division of said District, and names appellant and two others. The joint action is charged by stating as a conclusion that "defendants" mailed and caused to be mailed.

Appellant appeared before a United States Commissioner in Des Moines, Iowa, and gave bond that he would appear and answer said indictment at the opening term of said court at Sioux Falls, on October 17, 1923, at a term that was to begin on that day. For reasons that do not appear in this record, he did not appear in Sioux Falls on said day. On the 20th day of that month, he was in New York City. There, a proceeding under Section 1014 R. S. to remove appellant for trial to Sioux Falls in the Southern Division of said district was instituted. A Commissioner ordered that appellant be held for such removal.

Application for a warrant of removal was made to the District Court of the United States for the Southern District of New York. At this point appellant obtained a writ of habeas corpus from said court in which and on the hearing of which he resisted said removal on grounds that will be elsewhere fully stated. Said court dismissed the writ. Appeal was taken to the Circuit Court of Appeals of the United States for the Second Circuit. It affirmed and sent down its mandate. To avoid removal appellant gave bond that he would appear and answer in said Southern Division at its term to be held in April, 1923.

Between the giving of said bond and the said opening

time of the said April term said surrender to Commissioner was made, and said two habeas corpus proceedings now Numbers 341 and 342 were determined by the court sitting in Louisiana.

The assignment of errors made in the appeal to the Circuit Court of Appeals of the Second Circuit, the assignment made in each of the said two appeals from the action of the District Court of Louisiana, and the assignment made in the appeal to the Court of Appeals of the Fifth Circuit are identical, except as herein later differentiated. One difference is that in addition to what is presented in the other three appeals, to wit: the one in the Second Circuit and the two from the action of the District Court of Louisiana, and the assignment in the Circuit Court of Appeals of the Fifth Circuit, is that the latter, in addition to what is presented in the other three, has the question whether the District Court of Louisiana erred in holding by its dismissal of the last habeas corpus proceedings brought in said District Court, that it could execute said removal warrant after the first two appeals to the Supreme Court had been effected.

The only matters of difference between the record in Numbers 341 and 342 and the one in 705 is that the last has the question as to right to remove during the pendency of 341 and 342. The proceedings in New York do not have that question.

Another difference is that in the proceedings in New York the conclusion of the indictment that anything had been done by defendant in South Dakota was met by no affirmative testimony, while in the Louisiana proceedings said conclusion of the indictment was met by undisputed testimony that at no material time mentioned was either defendant in South Dakota (and there is no conspiracy count).

The questions for decision are these:

1. Where the only fact charge is a mailing in Iowa and delivery in South Dakota, has Dakota jurisdiction?

2. Should there be removal when the testimony is that accused was at no material time in the demanding district and same is not disputed except by a conclusion of the pleader put into the indictment?

3. Does Section 53, Judicial Code, permit indictment in one division when the charge is that the offense was committed in another division.

4. As said statute permits transfer from division to division on application by the defendant is there power to make such transfer on the application of the Government?

5. May removal be based on an indictment which states the naked conclusion that described letters were mailed with intention to aid the scheme set forth, when these letters show they were written to those who then had already been defrauded, if defrauded at all?

6. Does an indictment charging the use of the mails with intent to effectuate a fraudulent scheme to obtain money for stocks, with intent to defraud, charge any offense where it says nothing as to whether or not the stocks were worth all that was intended to be got or was gotten for them?

7. If the indictment is so framed as that it seems clear to the authorities acting in the removal proceedings, *in limine*, that demurrer will be sustained to it or that it will be quashed on motion—are these authorities to find probable cause and to order removal, though they believe on the exercise of a judicial function, that not only can there be no conviction but that there cannot even be a trial?

8. Is an indictment which is so confused and needlessly prolix and involved as that it does not fairly apprise the accused of what charge he is to meet and what he must do to meet it, not a violation of the Constitutional guarantee that he shall be thus apprised?

While we deny that there are any other questions, it is possible that respondent may urge the following additional ones:

1. May habeas corpus be used to try out said eight questions?

2. Should not the decision of the New York courts be held to be an adjudication against appellant?

3. Did not the giving of said appearance bond work either that the obtaining said writs in Louisiana is an abuse of process, or work an estoppel by waiver or some other estoppel?

As the decision in what is now No. 341 and No. 342 is a naked dismissal, and as such decision is presumed to be on the substance rather than on matters in abatement, and as no issue was joined on either of said three points, it is, to say the least, doubtful whether these points arise on the record of said appeals. But the record in No. 705 gives some slight color for claiming that said three points or some of them were considered by the court. Therefore we shall make the argument on these points in No. 705,—and ask same to be treated as if also made in No. 341 and No. 342.

While it may be it should be held that Circuit Court of Appeals for the Fifth Circuit sustains the lower court, we do not argue that in No. 705, because we do that fully in the argument in 341 and 342—and we ask that such argument be deemed repeated in No. 705.

SPECIFICATION OF ERRORS.

I.

Since the indictment has no fact allegation except that the mailing was done in Iowa and that what was then mailed was delivered in South Dakota, and has nothing more than the conclusion that accused caused delivery in South Dakota according to address—it was error to dismiss the writ and so to hold that the District of South Dakota has jurisdiction.

II.

It was error so to hold where it was the unimpeached testimony that at no material time was either defendant in South Dakota,—and there being nothing to dispute such testimony except possibly a conclusion of the pleader to the contrary.

III.

The court erred in holding that despite the provision of Section 53, Judicial Code, that prosecution should be had in the division wherein it is charged the offending was done, that the indictment was valid though returned in a division as to which no offending is charged.

IV.

It erred in holding that appellant might lawfully be removed for trial to Sioux Falls in the Southern Division on the transfer from the Western Division where the indictment was returned,—such transfer being on application by the Government, though Section 53 Judicial Code has no provision for transfer except on application of

the defendant,—defendant never having moved a transfer.

V.

It erred in holding there might be removal on an indictment which so far from showing that any letters were mailed in execution or attempted execution of the scheme alleged showed affirmatively that they were addressed to stockholders who had already parted with their money when the letters were mailed and who had then already been defrauded, if defrauded at all,—erred in holding that there could be an execution or attempt to execute what was already executed.

VI.

The court erred in holding that there might be a removal on an indictment which charged no offense in that it omits the essential allegation that the stock charged to have been sold to effectuate the scheme alleged was not worth all that the buyer paid for it,—the indictment thus being left without any allegation exhibiting intent to defraud.

VII.

It erred in holding there might be a removal upon indictment from which it appears that removal would be idle, for in that the indictment is in such condition that if there was a removal it was apparent that there would be no trial, much less a conviction, because the indictment was such as that demurrer to it must be sustained or that it must be quashed on motion.

VIII.

It was error to base a removal on such an indictment because the same is so confused, needlessly prolix and involved as that it does not meet the command of the Constitution that an indictment must fairly apprise the accused of what charge he is to meet and what he must do to meet it.

IX.

The court erred in holding (if it did so hold) that habeas corpus may not be availed of as to the matters complained of by appellant.

Grand Division I.

The Demanding Court and District (South Dakota) Have No Jurisdiction to Indict or Try This Appellant, Because the indictment Has No Material Fact charge Except That a Letter Mailed in Iowa Was Delivered in South Dakota. It Is Stare Decisis That This Is So, Though the Indictment Charges Both Deposit and a Causing of Delivery.

Part 1-a.

IT IS STARE DECISIS THAT, UNDER THE INDICTMENT AT BAR, THERE IS NO JURISDICTION EXCEPT IN IOWA, THE ALLEGED PLACE OF MAILING,—AND THEREFORE THERE IS NO RIGHT TO REMOVE APPELLANT TO SOUTH DAKOTA.

A representative allegation is the one in Count 1. It is there charged that for the purpose of executing their scheme, defendants

"Unlawfully, feloniously and knowingly did cause to be delivered by mail (at a town in South Dakota within the Southern Division) a described letter, which they placed and caused to be placed in the mails at Sioux City,

Iowa, for mailing and delivery, with intent that the letter should be carried by the mails and delivered to addressee in said town; and that it was thereupon delivered by the postoffice establishment according to the directions on the envelope. (22-342)

At the end of the indictment and speaking to all the counts of it, there is the further allegation,

"That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided." (41-342)

That is to say: There is, first, the conclusion that defendants caused delivery; second, that they mailed the matter which said conclusion declares they caused the delivery of; third, that the statute was violated by knowingly doing said "placing or causing the placing" of such matter in the mail, at Sioux City, Iowa.

In the case of *Stever*, 222 U. S. 167, the defendant was indicted in Kentucky where a letter mailed in Iowa was delivered. The letter was addressed to one in Kentucky, and there delivered to addressee. The indictment, as here, charges knowingly, etc., "depositing and causing to be deposited" in the mail in Iowa; and there is, as here, the conclusion that defendant had "caused" the said mailed matter "to be delivered by mail to the person addressed." So far, the two indictments are almost literally alike. The only difference is that the Stever indictment is less vulnerable than the one at bar because it does not have the allegation that the violation complained of is the knowingly placing in the mail. In its decision of the *Stever* case by this court, it italicizes the words of the lottery statute—"or at which it is caused

to be delivered by mail to the person to whom it is addressed"—and then says:

"The claim is that an indictment lies in the Western District of Kentucky, because that is the district in which the defendants caused the letter mentioned 'to be delivered by mail' to the person addressed."

It held that Kentucky did not have jurisdiction.

Unless there is some valid objection to or tenable differentiation of the Stever decision, it rules here that South Dakota has no jurisdiction.

Part 1-b.

THERE IS NO VALID OBJECTION TO OR DIFFERENTIATION OF THE STEVER DECISION.

An amendment to Section 5480 R. S. was effective, generally, at the time the *Stever* case was decided, but was never effective as to *Stever*. That is to say, the statute under which he was indicted did not have the words "or shall knowingly cause to be delivered, etc.," which quoted words are found in said amendment and in the Stever indictment. We freely concede that if the Stever decision is a construction of said amendment, that would, under some conditions, make it an *obiter dictum*. But we submit that this court did not construe said amendment; that in construing the quoted words it did not act gratuitously, but in response to having urged upon it that it should construe them. It was pressed upon it that this was all there was for it to do—that it should decide whether the statute which did rule the *Stever* case did not in effect have the equivalent of "knowingly cause to be delivered." Upon the assertion that it did have, was based the sole argument finally presented, to wit, that because the equivalent of those words was in the original statute, which the court undeniably had for construction,

Kentucky had jurisdiction,—and settling that issue could not be *dictum*. That this is the situation, a reference to the *Stever* record and to existing conditions when the *Stever* appeal was submitted, makes manifest. The Government was evidently of opinion that Section 5480 as it stood before said amendment did, in effect, though not in terms, prohibit those who like *Stever* were charged with being devisors of a scheme and knowingly causing matter to be mailed in aid of that scheme. It is inconceivable that the Government should put knowingly causing delivery into an indictment and make those words the basis for claiming jurisdiction if those words could be found only in an amendment that was *ex post facto* as to the *Stever* case. It is inconceivable that this court would base its decision on such an amendment. *Ex post facto* construction is as bad as *ex post facto* legislation. Erbaugh, 173 Fed. at 435.

It is plain the pleader must have proceeded on the theory that the equivalent of said words was in the statute that did rule the *Stever* case. When the case was submitted, the Government in its brief set out the statute, plus said amendment, and in that brief advised the court that, "the result (of amending) is no substantial change in the law, but a reassembling of the provisions relating to a scheme to defraud, in a more suitable manner." Such concessions have always been deemed effective. (Burr's case, 8 U. S. 505.)

Here, then, was, first, the framing of the indictment (which unless we are to assume that the Government desired a decision to be based upon an *ex post facto* amendment) declares that the effect of these words is in the original statute and, second, a square concession and contention that the amendment had not changed the original as to the point that was before the court. In other words, that after the amendment, as well as before,

the original prohibited those who had devised a scheme from knowingly causing mail to be delivered in an attempt to execute such scheme. The effect of it all was that the parties joined issue, and there was finally submitted as the sole issue, whether the said words found in said amendment and in the Stever indictment, had their fair equivalent in the original statute, and whether, that being so, the presence of those words there gave jurisdiction to a district in which the mail was delivered, but in which it was not mailed.

Manifestly, the decision cannot be attacked for being an *obiter dictum*. For, an *obiter dictum* "is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it." Hart (Fla.) 6 So. 455, 456.

The real objection to such *dictum* is that it is a pronouncement on a point which the parties failed to notice and on which no argument or authorities are presented. *Lyman*, 161 N. Y. 119. In *Rohrbach*, 62 N. Y. 47, 56, it is said that "*dicta* are opinions of a judge * * * made without argument or full consideration of the point." And *First Bouvier*, p. 568, says of this definition that "probably no better definition can be found." So does *Newman's case*, 49 S. E. 926, 931, and see *Brown*, 102 Wis. 137.

Surely, that objection will not lie here. The point was pressed for decision. It was not only fully argued, but all essential argument was addressed to it. The court not only gave the point consideration, but treated this single point as being the controlling one.

That criticism cannot be made where a matter is submitted for decision, is fully argued, is all that is submitted and is fully considered. If what is said in such circumstances be a *dictum* at all, it is a *judicial dictum* as distinguished from an *obiter*. See *Bouvier* and also

15 C. J., page 953, supported by many citations from Illinois, Ky., Miss., N. J., New York, Pa. and Wis.

Judicial dictum is the expression of the views of at least a majority of the court upon a matter which, while possibly not essential to a decision, was presented, argued and considered * * * they should accordingly not be disregarded without extraordinary reasons appearing therefor. Such declarations as to the law are, to say the least, very persuasive, and *nisi prius* courts and counsel, in absence of something to the contrary, usually act upon them.—*Zeuske* v. *Zeuske* (Oregon) 103 Pac. 648, 651.

An expression of opinion upon a point involved in a case argued by counsel and deliberately passed upon by the court, although not essential to the disposition of the case, if a *dictum*, should be considered a *judicial dictum*, as distinguished from a mere *obiter dictum*," *i. e.*, an expression originating alone with the judge who writes the opinion, as an argument or illustration.—*De Rosa* (Vt.) 76, At. at 153, 155.

All the propositions assumed by the court to be within the case, and all questions presented and considered and deliberately decided by it, leading up to the final conclusion, are as effectually passed upon as the ultimate question solved, and the judgment is authority upon all the points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching the final conclusion.—*Brown* v. *Railway* (Wis.) 78 N. W. 771.

But as said, we contend there was no *dictum* at all, but a square decision—a binding definition that "knowingly cause to be delivered," does not give jurisdiction to a district in which no mailing was done.

Division II.

Had There Been No Stever Decision, It Would Still Be Judicial, Legislative and Contemporaneous Construction That Said Amendment Has Not Given Jurisdiction to a District in Which No Mailing Was Done.

Part 2-a.

THE JUDICIAL INTERPRETATION OF THIS AMENDMENT IS THAT IT IS A CHANGE IN SUBSTANCE AND HENCE, THAT IT IS NOT A VENUE PROVISION. FOR A PROVISION DEALING WITH VENUE DEALS WITH PROCEDURE AND NOT WITH MATTERS OF SUBSTANCE.

The C. C. A. case of *Bettman*, 224 Fed. at 825, and of *Charles*, 213 Fed. 710, declares that the amendment is "an enlargement" of the statute and treats it as dealing with the meaning and use of the words scheme and artifice." And the *Bettman* case asserts that, by implication, *Young's case*, 236 U. S. 161, holds the amendment works an enlargement of what constitutes the scheme or artifice. Atwell Criminal Procedure, Section 55, declares the amendment broadens and betters the statute. And in its brief in the Stever case, the Government, as seen, concedes that the amendment affects *substance* in that the result is said to be no substantial change in the law but a reassembling of the provision relating to the scheme to defraud, in a more suitable manner.

As venue provisions deal with nothing but procedure and therefore do not deal with substance, an amendment that constitutes a mere broadening or enlarging of the substance of a statute is therefore not a venue provision, and works no change in place of trial.

We add to the concession made by the Government the assertion that the concession but states the fact. We

hope to show that though the original statute does not have the words of the amendment, it has their fair equivalent so far as devisors of schemes are concerned. And of course the fair equivalent of words has the same effect as if those words were found in the statute in terms. The Stever decision so deals with obtaining by false pretenses, because while the statute does not have those words, it does prohibit "any scheme or artifice to defraud." To like effect is the *Bettman case* (C. C. A.), 224 Fed. 825; the *Samuels case* (C. C. A.), 232 Fed. at 536, 540. And see *Stockman's case,* 205 Fed. at 467, 468.

In a word, we shall attempt to show that so far as those who, like the appellant, are charged with having devised a scheme, are concerned, the original statute prohibited their knowingly mailing in aid of that scheme—wherefore, the Stever decision construed not the amendment, which did not apply to Stever, but the original statute which did.

Part 2-b.

IN ADDITION TO JUDICIAL CONSTRUCTION THAT CAUSING CONSISTS OF MAILING THAT, THEREFORE, THE VENUE LIES WHERE THE CAUSING IS DONE, AND THAT A PROHIBITION OF "CAUSING TO BE DELIVERED" DOES NOT CREATE ELECTIVE VENUE, THAT IS ALSO THE LEGISLATIVE AND CONTEMPORANEOUS INTERPRETATION OF SAID QUOTED WORDS.

These interpretations are merely declarative of the settled law that elective venue does not exist unless expressly created. This was held in three libel cases wherein removal was unsuccessfully sought from the district of mailing to the one in which the libel circulated. (*Cummerford,* 25 Fed. 902; *Dana,* 68 Fed. at 888, 889; *Smith,* 173 Fed. 227.) If this be sound law the same conclusion must be reached here because Section 215 does

not have an express elective venue provision—or for that matter any venue provision.

Coming now to legislative construction of the words of the amendment:

The lottery statute has the words "knowingly causing to be delivered" but it also has a specific provision for elective venue. If the quoted words were deemed sufficient to provide such venue, why was such express venue provision added? The Mann Act, 36 Stat. 825, 826, punishes those who knowingly transport "or cause to be transported" any female or procure or obtain "or cause to be procured or obtained" tickets, etc.; or knowingly persuade her or cause her to be persuaded or "knowingly" cause * * * such woman or girl to be carried or transported. But Congress did not deem the word "causing" to authorize elective venue, because it added to the word or words "causing" a specific provision giving an election as between several places wherein prosecution might be had.

This invokes the rule that where there is legislative construction in one act as to the meaning of certain words this is entitled to consideration in construing the same words in another act. *Railway* v. *Railway,* 53 Pa. State, 20. Indeed, a presumption is raised that the meaning attached to words found in one enactment are intended to have the same meaning when used in another enactment.

When the subject matter to which words in statutes enacted at different times have reference is the same, it should be presumed the words were used in the like sense in each of the different enactments. 25 R. C. L. (Statutes), Sec. 238.

Whenever a legislature has used a word in a statute in one sense, and with one meaning, and subsequently uses the same word in legislating on the same subject

matter, it will be understood as using it in the same sense. *Eckerson* v. *Des Moines*, 137 Iowa, 452; *In re Linn County*, 15 Kan. 500; *State* v. *Garthwaite*, 23 N. J. L. 143; *Oneida County* v. *Keppler*, 125 Wis. 18; *Oneida County* v. *Tibbits*, 125 Wis. 9; *U. S.* v. *Twenty-Four Coils of Cordage*, 28 Fed. Cas. No. 16,566; *Baldw.* 502 (affirming 28 Fed. Cas. No. 16,573, *Gilp.* 299).

It is not permissible construction to make one statute cover what is effected by another. *U. S.* v. *Sauer*, 88 Fed. at 250; *Stever* v. *U. S.* 222 U. S. 167.

Nor did Congress stop with so interpreting the word "causing." It has steadfastly declined to put those words into what is now Section 215 Penal Code, or into any statute except the lottery statute.

Assuming for the sake of argument that Congress could authorize prosecution for the mailing of a letter in a district where the mailing was not done but where delivery occurred, yet it was not bound to authorize this. And legislative history shows that it declined to do it.

Section 284 of Chapter 355, Act June, 1872, was the beginning of forming what afterwards became the lottery statute. (Section 3894, R. S.) This section contained none of the phrases now under discussion. But when what later became Section 3894 was amended in 1890, then, for the first time, was inserted the words "knowingly cause to be delivered"; also the alternative venue provision which has ever since been retained in the lottery statute. It was in 1901 the first attempt was made to put into what is now Section 215 what the amendment of 1890 had put into 3894. The attempt was made in the report of a commission created by Congress to file a preliminary draft of a penal code. This report also proposed putting said amendment into the statute dealing with the mailing of obscene matter and the one dealing with unmailable matter, generally. There seems

to have been no action on this report for some time. But on April 10, 1906, at the first session of the 59th Congres, H. R. 17984, being a proposed code of penal laws, was introduced. Section 223 of this proposal was practically identical with the proposal found in said report of the commission made in 1901. And by means of that section, and of Sections 218 and 225, it was proposed to keep "causing to be delivered," and elective venue in the lottery statute, and also to put these into the obscene letter, statute, and the one dealing with nonmailable matter, generally. No action seems to have been had on this bill. But on January 10, 1907, H. R. 23946, was introduced as a substitute for H. R. 17984, and this substitute was a proposed revision and codification of the penal laws. Section 208 of H. R. 23946, eliminated the said report of the commission in 1901, and of H. R. 17984, which report and bill proposed the double venue, from the statute on obscene and libelous matter, and also from the one dealing with nonmailable matter, generally. But it retained it in the lottery statute. Nothing seems to have been done with the substitute. But on January 7, 1908, Senate Bill 2988 was introduced. Section 16 of this Senate Bill followed H. R. 23946 in eliminating the said proposal of the commission made in 1901, and of H. R. 17894. The Senate Bill retained alternative venue for the lottery statute, only. Very shortly thereafter Section 215 of the Penal Code was enacted, and without the proposed and recommended provision for election between districts. This can but mean that Congress deliberately rejected all proposals for double venue except as to the lottery statute.

> An undeviating course of legislation in a certain direction, continued for a long time, and being an effect to perfect the law relating to a certain subject, strongly emphasizes the expression found in

the final declaration of the legislative will. *Wellsbury* v. *Traction Co.* (W. Va.), 48 S. E. 748.

And the refusal of the legislative body to insert a provision contained in an act as originally reported to it is most persuasive against construing the act passed to include that provision. 25 R. C. L. (Stat.), 271. *Weaver* v. *Davidson* (Tenn.), 59 S. W. 1105; *Calhoun* v. *Little* (Ga.), 32 S. E. 86.

Where a committee of high standing reports that existing law permits no removal to the District of Columbia, and "upon this report, no further action was taken nor any further legislation proposed * * * nothing short of express legislation (giving such jurisdiction) could be weightier as contemporaneous construction." *Dana,* 68 Fed. at 902, 903.

There is no reason for saying that in said amendment of Section 215 Congress for the first time intended by a prohibition of "causing" to give jurisdiction to the district of delivery though it was not the one of mailing. No reason appears why, if it was intended to permit prosecution in that district, Congress would not have continued its practice of saying so in plain words. The courts will not conclude that Congress "which might easily have conferred jurisdiction in plain and explicit language resorted to contrivance to perfect it."

Chapman v. *U. S.* 164 U. S. 436, 17 Sup. Ct. at 79.

An attempt having been made to have the word "writing" include "letter" it was held that as it appeared in all the statutes *in pari materia* that Congress used the word "letter" when that was intended it should not be held that Congress "adopted some unfamiliar and inferior and in every sense ambiguous term to express the idea." (Letters.)

Chase v. *U. S.* 135 U. S. 255, 10 Sup. Ct. 756.

Why should this court hold that Congress intended to create an elective venue by using "causing to be de-

livered" which is truly an "unfamiliar, inferior and in every sense ambiguous term to express the idea" of permitting prosecution either in the district of mailing or in that of delivery.

As to contemporaneous construction:

Prior to the decision of the Stever case, it seems to be the only one in which an attempt was made to prosecute in a district other than the one of mailing, to wit, the one in which delivery occurred.

Since the time when the amendment became effective, and to the time when the indictment at bar was returned, the only case in which there was an indictment in the district other than the one of mailing was that of *Moffatt.* (C. C. A. 232 Fed. 522.) And in it jurisdiction was not mooted.

An investigation beginning with the time when the amendment became effective, and ending with the advance sheet pamphlet of November 1, 1923, discloses that with the exception of the Moffatt case, in 42 reported cases it appears affirmatively that the prosecution was in the district of mailing and in the remaining 33 the same thing appears by unescapable implication—and in none of them the provision of the amendment "knowingly caused to be delivered" is so much as mentioned.

The summation is that the words of the amendment were not generally believed to authorize prosecution in a district in which no mailing was done.

Part 2-c.

THE AMENDMENT WAS NOT INTENDED TO WORK A CHANGE IN PLACE OF PROSECUTION, BUT TO REACH A NEW CLASS OF OFFENDERS.

We have pointed out in another place that the courts have construed the amendment to be a change of substance and therefore, not an alteration of mere procedure, to wit, regulation of place of trial. We now submit it appears affirmatively that it had for its object something other than making a change in the place of prosecution. Our position is that what the amendment does do is to add a class who before the amendment became effective where immune from punishment, no matter how much they caused or aided delivery, so long as they were not parties to the devising of the scheme.

It is a truism that if the amendment is not directed to the offense here charged it affects that charge no more than if no amendment had been enacted—that if it does not affect this indictment at all, it does not affect the place where prosecution thereunder shall be had.

Public history discloses that employees of the postal establishment aided in delivery of objectionable matter. The amendment begins with "or" and is therefore in the disjunctive; which means it is not a substitute but a covering of something not found in the original, or at least a covering of something whose presence in the original was open to doubt. (*Culp*, 82 Fed. at 991.)

Congress knowing this public history and knowing that the original statute did not affect those who merely aided a scheme devised by others than themselves. (*Foster*, 171 Fed. 171; *Stewart*, C. C. A. 119 Fed. at 93, 94) made this amendment—manifestly, to cure this *casus omissus;* and it is not to be inferred that by so doing it intended to change the meaning of words it

had already employed in the original; *i. e.*, to give them a meaning creating an elective venue which meaning did not belong to the words of the original. (*Milby*, 121 Fed. at 1; *Kellogg*, 126 Fed. at 326.)

It is presumed an amendment is not a substitute for but a branch of the original enactment, and, as said, in *U. S.* v. *Sauer*, 88 Fed. 249, the amendment "becomes merged in the other but each one moves off separately."

It is said in *Charles* v. *U. S.* (C. C. A.) 213 Fed. at 710, that in making this amendment it was "the intention of Congress to reach *any and all classes* of individuals who may form the intention of using the mails for fraudulent purposes," including persons who might carry out a plan to defraud by means of invoking the aid of those who were not parties to the original scheme. And the Bettman's case (C. C. A.) 224 Fed. at 825, approves what is above quoted.

If we assume that mailing by devisers is a knowingly causing delivery of what they mail, then, if it is held that the amendment is aimed at devisers, it must first be held that Congress intended the amendment in the disjunctive, to be a repetition of the original. And it must be held, also, it was intended to inflict the single penalty of the statute, twice. Once, for mailing. Again, for causing delivery, another name for mailing. As well claim that if there were a conviction on an indictment that sets forth the doing of acts that constitute larceny, and which indictment also states as a conclusion that larceny was committed, the penalty of the statute must be twice inflicted.

In both the *Stever case* (222 U. S. 167) and in *U. S.* v. *Sauer*, 88 Fed. at 250, it is ruled that Congress should never be held to have intended to make two distinct provisions referring to the same subject matter; and the *Stever* case holds that, therefore, Congress could not

have intended to make the offense denounced in Section 215 indictable under either of two distinct statutes. Surely, it would be a greater anomaly to attribute an intent to have that section punish the same act twice with the sole punishment provided in the statute. Concretely applied, doing this would work that the penalty of Section 215 would be inflicted for the acts constituting a causing to be delivered, and inflicted again for the offense of causing to be delivered, charged by way of conclusion.

As it is universally held that the depositing and causing to be deposited, etc., is a complete offense, of course that offense may be punished only where the depositing, etc., was done. If the government may prevail, it must first be held that the prohibition of causing delivery creates an additional offense which may be proceeded against in either district, though the depositing, etc., can be prosecuted only in the district where the mailing is done; and it must next be presumed for the government that it was intended to draw a wholly duplicitous indictment. For each and every count charges both the complete offense of the mailing done in Sioux City, and, on the theory of the government, the additional offense of causing delivery of what was mailed in Sioux City. At this point we are not presenting an argument on the effect a duplicitous indictment has on the right to remove. We are but arguing that if by reason of being a complete and new offense a causing of delivery gives jurisdiction to South Dakota, that jurisdiction must be granted at the expense of presuming that a wholly duplicitous indictment was intended to be drawn.

It will be conceded that South Dakota is without jurisdiction so far as the original statute is concerned.

If it has jurisdiction it must come from the fact that the amendment has added a new offense which is of such nature as that prosecution may be had in the district of delivery, though that is not the district of mailing. If the amendment does not create a new offense, then of course it does not create one of such nature as to give venue to South Dakota. If a new offense is needed for that purpose, the purpose is not accomplished if there be no new offense. The indictment was not intended to charge any newly created offense. As seen, it cannot be construed to assert such offense unless it is first presumed the pleader intended to frame a duplicitous indictment. The complete offense of placing the described letter in the mail is charged. If the causing is an additional offense, then each count of the indictment charges two offenses. If it should not be presumed for the pleader that he intended a duplicitous indictment the pleading must be assumed to have been drawn on the theory that the amendment creates no new offense. There being no such offense created, there falls to the ground any theory of elective venue based on the assumption that the amendment does create a new offense.

We submit that the amendment does not create a new offense, and that that fact makes immaterial to consider what would follow if the amendment created a new offense. We repeat, the purpose was to bring a new class of offenders within the statute.

Part 2-d.

THE GIVING THE SAME ACT TWO NAMES IS NOT TO BE PRESUMED; AND IF DONE, EFFECTS NOTHING.

It must be so that only the *casus omissus* only was aimed at. A post-office employee might cause delivery, innocently. Therefore, the putting the word

"knowingly" into the amendment demonstrates that it was other than devisors who were being dealt with. As to the devisors, the word "knowingly" was unnecessary. For one who mails to aid his own scheme, of necessity, acts "knowingly." As to post-office employees it was a necessary limitation because, manifestly, they might cause delivery either knowingly or innocently. The sole object of the amendment was to punish others than the devisors if they knowingly aided delivery—and thus to punish those who without the amendment would be immune.

In *Nielsen's case*, 131 U. S. 176, 9 Sup. Ct. at 676, 677, and *Ex Parte Lange*, 85 U. S. at 171, there is approved a New Jersey decision (*Cooper*, 1, *Green*, 361) that one who had been convicted for arson cannot be punished under a later indictment for the murder of one who came to his death from burning in the fire caused by that arson. The *Nielsen* case rules also that one who is charged with murder committed in the perpetration of a burglary if acquitted on that, cannot afterwards be convicted of a burglary with violence in aid of which said murder was done; and so of murder and manslaughter; and of seduction and fornication with the same prosecutrix. (677) It holds, too, that while the crime of loose and lascivious association and cohabitation does not necessarily imply sexual intercourse like that of living together as man and wife, yet it is strongly presumptive of it; and that, be that as it may, it seems clear that where one has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents, without being twice put in jeopardy for the same offense.

In *Telegraph Co.* v. *Bierhaus* (Ind. App.) 36 N. E. 161, it is held that where one statute declares a given act to constitute a criminal offense and prescribes pun-

ishment therefore, an amendment in the nature of a penal or *qui tam* enactment should not be so construed as to bring the act constituting the crime or offense within the purview thereof, unless the amendment so provides in express terms.

The test is simple: if these defendants were indicted and tried for the mailing in Sioux City, and were either acquitted or convicted, would it be claimed they might thereafter be indicted and tried, anywhere, for causing the delivery of the letters mailed in Sioux City. The sum is the concession by the Government made in the *Stever* brief, *i. e.*, the amendment has made no change in place of prosecution of devisers of schemes. It touches devisers in no respect.

Part 2-e.

THERE IS NOTHING IN THE WORDS "OR SHALL KNOWINGLY CAUSE TO BE DELIVERED" THAT, EVEN SUGGESTS THAT IT IS INTENDED TO SUBSTITUTE THESE WORDS FOR "MAY BE PROSECUTED EITHER IN THE DISTRICT WHERE THE MAILING WAS DONE OR IN THE DISTRICT WHEREIN THE MATTER MAILED WAS DELIVERED."

It may be conceded that if delivery were denounced venue would lie in the district of delivery because self evidently Congress knows that delivery will be made in the district where it occurs. But so much cannot be said of a prohibition against causing delivery. As said, nothing in those words so much as suggests that place of prosecution is being dealt with. And, as seen elsewhere, Congress as well as the bench and bar have construed the causing of delivery not to be the creator of elective venue.

There is nothing in the words "causing to be delivered" which can work any change in place of trial. To say so is simply to say that using the word "white"

does not warrant a construction that the word used means "black."

It is not enough that there was *an amendment.* If the change were, say, one in the statute of limitations, or in penalty—to contend that this changed the place of trial would not be no more violative of reason than is a claim that prohibiting the causing of delivery is a declaration that one may be tried in a district where no mailing was done.

This discussion cannot be more aptly closed than by certain quotations approvingly made in the Chase case, 135 U. S. 255; 10 Sup. Ct. at 758. The first is one from Queensbery's case, 1st Bligh. 497:

> "The proper mode of disposing of difficulties arising from a literal construction is by an act of the legislature, and not by the decision of courts."

The second is from *Jones* v. *Smart*, 1st Term R. 51:

> "It is safer to adopt what the legislatures have actually said than to suppose what they meant to say."

Division III.

Without Reference to the Stever Decision, It Is Settled Law That Devisors of Schemes May Be Prosecuted Only in the District Where They Did the Mailing, and This Is So, Though the Statute Denounces Their Causing a Mailing in Aid of Their Scheme.

It cannot be said too often that the statute does not denounce the act of delivery; that it limits is prohibition to a causation of delivery. It is a trite argument often used in opposition that a violation of Section 215 as amended is analogous to where a shot is fired on one side of a boundary line and its impact causes a homicide on the other side of the boundary. The analogy is utterly imperfect. Firing such a shot with such result is clearly

within Section 731, R. S. The thing denounced being the killing, the firing of the shot is not the complete offense. It is completed on one side of the boundary by an act initiated on the other side which was fairly calculated to accomplish murder where it did so. We shall speak to this point more fully in dealing with Section 731 and when we seek to distinguish as to venue to prosecute for an act completed in one district which has injurious consequences in another, and an act which becomes complete by action in two districts. For present purposes, we but inject this consideration of the boundary line argument to make clear that said particular argument is untenable when applied to a case like the instant one.

It would be a perfect analogy if the statute, instead of denouncing a murder, prohibited merely the firing of a shot with intent to kill. In that case, no one would contend that the shot effective in a second district would permit prosecution except in the first district where the prohibited firing of the shot was done. It is the word "causing" used as a verb which the amended statute involved here denounces. The supposed case of prohibiting the firing of the shot is a perfect analogy. So would be a statute prohibiting the winding up of a clock. If that were completed in Iowa there could not be prosecution in Illinois, because as a result of that winding, the clock was found running in Illinois. If two, while in Iowa, bargained that one should cut wood standing in Illinois, whatever consequences attached to causing the wood cutting would have to be dealt with where the bargain was made. It would not transfer venue to Illinois, because the cutting thus bargained for in Iowa was done in Illinois.

(See page 33.)

Part 3-a.

SO FAR AS DEVISERS OF SCHEMES ARE CONCERNED, PROSECUTION FOR CAUSING DELIVERY MUST BE HAD IN THE DISTRICT WHERE THE MAILING IS DONE BECAUSE MAILING BY THEM IS THE CAUSING OF DELIVERY.

If it be the law that mailing by a deviser is a causing of delivery, the constitution commands that the prosecution must be had where the mailing was done—and the indictment says the mailing at bar was done in Iowa. That mailing is causing, is *stare decisis.*

We have, throughout, assumed for the purposes of argument, merely, that as to defendants in the class in which the defendants at bar are, causing to be delivered must be punished where the mailing is done—have so assumed that causing delivery on part of those in that class consists of depositing in the mail with due address and stamping, and with intent that the establishment shall make delivery according to the directions on the envelop. We now submit that what we have heretofore assumed is in fact true.

There are but three acts for which it *can* be claimed that they cause delivery. (a) the act of delivery; (b) doing something to aid hastening or insuring delivery after the mailing has been done; (c) putting into the mail with due address and stamp. The first two are eliminated. The indictment does not accuse defendant of having done either. No act subsequent to the mailing is charged—and self-evidently the act of the post office establishment in making a delivery cannot be "causing" done by the *mailer* and devisor.

The original statute in terms denounces the depositing of a letter to be sent or delivered by the post office establishment. *Young,* 232 U. S. 155; 34 Sup. Ct. 303,—and it is universally held that such phrase

describes the having the letter carried and delivered through the mail. Sauer, 88 Fed. 252; *Hume,* 118 Fed. 695,—In *Rinker's* case (C. C. A.) 151 Fed. 757, it is held that mailing a letter duly addressed and stamped is a deposit in the post office for mailing and delivery. To like effect is the *Olsen* case (C. C. A.) 287 Fed. 89, citing *Young,* 232 U. S. 155; 34 Sup. Ct. 303, and the C. C. A. decisions of *Rimmerman,* 186 Fed. 304, and *Hume,* 118 Fed. 689.

Deposit with due stamping and intent to have the letter delivered, sets in motion the machinery of the post office department. (*Morse,* 287 Fed. 912.)

Add to this the presumption that the machinery set in motion is that which will accomplish delivery and it is once more made plain that the proper mailing of a letter works a causing of delivery.

Manifestly there can be no causing of delivery without some act on the part of the mailer. He must do something to invite action on the part of the establishment. It has been held that the deposit of a letter duly addressed and stamped, discloses his intent that the establishment should deliver the letter to the addressee. *Stokes,* 157 U. S. 187; 15 Sup. Ct. 619, last column near bottom.

It will be conceded that if one placed a letter in the post office and the letter was without address or stamp affixed, or lacked both, that nothing had been done to cause delivery. Such deposit would give no authority to make delivery and therefore the agents of the establishment would do nothing to bring about delivery. Even as it must be conceded that such deposit would not be a causing of delivery, must it be conceded that when the deposit has due address and stamp, the establishment has a duty to deliver and a presumption is raised that the establishment will do what it should to bring about delivery, and that delivery in due course has been ac-

complished. The stamping is what "legally sets in motion the machinery of the post office department." Morse 287 Fed. 912. And see the Demolli case (C. C. A.), 144 Fed. 363.

Since the law does not permit a step toward delivery to be taken until the mailer has deposited, duly addressed and stamped, since it is the law that when he has done that, there is a duty to take the steps that will bring about the delivery and that that duty has been performed in due time and course, it must be true that the doing of said acts is the causation of delivery. It must be true that where an act is done for the purpose of inducing the establishment to deliver, that without such act no such step would be taken, where such step creates a duty to deliver, and general experience shows that duty was performed, such act must be the causing of delivery.

Would not one who had addressed a letter, stamped the envelop and deposited both in the mail, feel in common with all men that he had caused delivery to be made—had effectively arranged for delivery?

Following the *Lemmon* case (C. C. A.) 164 Fed. 957; the *Olsen case* (C. C. A.), 287 Fed. at 89, construes Section 215 as now amended, and holds that the "mailing" is execution or attempted execution of the scheme "is the gist of the offense" denounced by the statute; and that it is that act and it alone that confers jurisdiction upon the courts of the United States to punish authors of fraudulent schemes." Since then after the enactment of the amendment, mailing remains the gist of the offense and is still the only act that gives the federal courts power to punish, it must follow that the venue is still confined to the district of mailing.

Another reason why mailing constitutes causing is found in the line of decisions of which *Olsen's* case

(C. C. A.) 287 Fed. 89 seems to be the last and which holds that mailing still remains the gist of the offense. Both original and amendment should be given effect and both should be held to effect something. Now the amendment merely prohibits causing delivery and says nothing as to what shall constitute such causing. But the original does prohibit mailing. If it be not the meaning of the amendment that those who helped delivery in aid of a scheme devised by others shall also be punishable, the amendment has no ascertainable meaning. If it does not mean such mailing, there is, as said, no statement as to what act shall constitute the causing, and the amendment will be wholly without meaning.

Mailing is causing because the statute is directed to schemes "to be effected by * * * opening * * * correspondence or communication * * * or by inciting another to open communication with the person so devising or intending." It is impossible to see how such inciting can be accomplished and communication obtained except by the act of mailing for the purpose of having the thing mailed reach the addressee—by doing what through the action of the department obtained by the mailing will procure such correspondence or communication.

Part 3-b.

WHERE, AS HERE, "CAUSING" IS USED AS A VERB, VENUE LIES ONLY WHERE THE MANCHINERY THAT OBTAINS DELIVERY IS SET IN MOTION.

It cannot be said too often that the words, "causing to be delivered," do not prohibit delivery; that the prohibition is not directed to a result but to steps taken to bring about a result; that the prohibition is directed to acts of causation and not to effects. In other words,

what is denounced is described by the verb "causing"—and it is a truism to say that venue lies only where whatsoever constitutes a causing was done. For illustration, if it could be made a crime to wind up a clock and it were wound up in Illinois the prosecution would lie in Illinois, only, even if after the clock was wound it was carried across in another state and permitted to keep on running as long as it would on the winding done in Illinois. If the causing timber to be cut in Illinois could be made an offense if, of two, while in Iowa, one hired the other to cut timber standing in Illinois, the prosecution for causing the cutting would lie in Iowa, only, though the cutting were done in Illinois.

In fewer words, "causing" is merely an impetus that sets in motion what later may produce or produces the natural effect of the causing. But the venue lies only where the setting in motion is done.

Where one so deposits a letter as that the deposit becomes a means of effecting delivery in aid of his scheme, he has caused the delivery that later takes place.

The verb "cause" never has the meaning of nouns such as "result" or "effect." To cause, is the setting in motion the machinery that brings about a result or effect. It follows that if the delivery of a letter is caused in Iowa, prosecution must be had there, even if the causing done in Iowa brought about a delivery in South Dakota.

The meaning of "cause" when used as a verb is elementary dictionary learning. The Century Digest defines it to be (a) to "act as a cause or agency in producing"; (b) to "effect"; (c) to "bring about"; (d) "to be the occasion of." That means the causation of delivery is a setting in motion that which causes others than the depositors to deliver the deposit.

Manifestly mailing is (a) the "cause or agency" pro-

ducing delivery; (b) the act that would "effect" or "bring about" the delivery; (c) it is the "occasion of" the delivery; (d) it is calculated to effect the delivery and is an efficient selection of means; (e) if an offense at all it is "a single act" actually committed in Iowa and nowhere else; (f) though "the ultimate consequence" of the act happened in South Dakota, that is a state in which defendant "did not act" and (g) Iowa is "where the manifest act of defendant was done—where his active agency was employed." In effect the instant case does not differ from that of *Fowkes* (C. C. A.), 53 Fed. 13, in which a voucher was signed in one state, a rebate was thereby to be caused to be paid in another and wherein it was held the venue lay in the state where the voucher was signed.

(See page 54.)

The courts have had occasion to define this verb. It is done in the Demolli case, 144 Fed. 363. This case is quoted approvingly in the case of Kenofsky, 243 U. S. 440; 37 Sup. Ct. 439. In it, defendant devised a scheme to defraud an insurance company by collecting on a spurious death claim. He knew he handed the proofs to a superior officer, knowing that they would, as in fact they were, be mailed by the latter in the usual course of business to the home office for approval before payment. It is held that his act of delivering the letter to his superior was a causing because the word—

> "Cause is a word of very broad import, and its meaning is generally known, and it is used in the section in its well known sense of bringing about, and in such sense applicable to the conduct of the defendant (for in that) he deliberately calculated the effect of giving the false proofs to his superior officer; and that effect followed, demonstrating the efficacy of his selection of means."

That is to say, a causing is accomplished when one does an act calculated to produce the effect desired. Applying this to the situation at bar, it is a ruling that the "causing" was done in Iowa.

It follows that when court decisions define what acts constitute a causing, then, even if the decision is not made in a case involving mailing, it still follows that when it is judicially declared what acts constitute a causing, the Constitution steps in and says the prosecution for doing those acts can be had only where those acts are done.

In the case of *Demolli* (C. C. A.) approved in *Kenofskey's case*, 243 *U.* S. 443 and that of *Rose*, 227 Fed. 362, the charge was—having knowingly deposited and caused to be deposited in a described post office "for mailing and delivery" a newspaper containing certain obscene articles.

The question is "was there any substantial evidence that the objectionable matter was by the defendant knowingly deposited or caused to be deposited in the post office for mailing or delivery."

It is said that under the evidence recited and which was found by the jury to be true, the defendant was responsible for the mailing of the objectionable matter since.

"he set in operation and made use of an agency which as he knew at the time would according to its established and regular course carry the objectionable matter through the mail to the persons to whose attention he designed it should be brought."—That one is responsible if there be an act "intentionally done by him with knowledge at the time that such (the deposit) will be its natural and probable effect." (365)

It was said in *Bone's case* 95 U. S. at 130, "the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation."

That is, one "causes" when he sets in motion what he has reason to know will produce a result he desires. Applied here, it means he causes delivery when he does what makes it the duty of the Post Office establishment to deliver. His offense is complete when he so sets in motion. As said in the *Morse case,* 287 Fed. 912, mailing, duly stamped is the act which brings about "that the machinery of the United States Post Office department would be legally set in motion."

Get a definition of "causing" and it settles what district the prosecution may be had in. Once ascertain what acts constitute "causing" and the constitution does the rest. So while the Demolli case is not addressed to venue it gives such a definition of what constitutes a "causing" as that under the Constitution a prosecution for violating Section 215 can only be had wherever that is done which constitutes a "causing."

While the *Moffatt case,* 232 Fed. 532, is a *dictum* on where prosecution for causing delivery may be had, it decides that mailing the letter is the causing of its delivery. Moffat was convicted in St. Louis for causing delivery. The only causing shown was a mailing in Chicago. It is declared the evidence shows "that it was he that caused the preparations of the inclosures, the paying of the postage and the mailing of the letter at Chicago, with the intent and purpose that it should be delivered at St. Louis; and the fact that it was received at the post office in St. Louis instead of being delivered by the Department itself, at the special address, in no manner qualifies the intent and purpose with which the defendant deposited it."

Other decisions reach the same result because they define causing to be delivered to be a conscious participation in bringing about the use of the mail in aid of a

scheme to defraud. *Shea*, 25 Fed. 447; citing *Kenofskey*, 243 U. S. 440, 37 Sup. Ct. 438; *Goldman* (C. C. A.), 220 Fed. 57, 61, 63. See *Spears*, 250 Fed. at 251. It is self-evident that where one has devised such scheme and mails a letter intending to aid that scheme by so causing the letter to be delivered to the addressee, he is consciously participating in the causing of delivery—indeed—is using the mails in a way that brings about a delivery in aid of such scheme.

Then there is the line of cases of which *Olsen* (C. C. A.), 287 Fed. 89, seems to be the last, and which holds that the *mailing* is the gist of the offense and that it, and it alone, is the source of all jurisdiction to punish. The amendment was effective when the Olsen decision was made.

Division IV.

The conclusion of the pleader that defendants knowingly caused the letters mailed in Sioux City to be delivered in South Dakota will not suffice. It sets forth no offense. It merely gives the opinion of the pleader that an offense has been committed. (See 90-94.)

A naked conclusion that defendants did such causing brings the matter fairly within the statement of the *Hess case*, 124 U. S. 483, a mailing case, in which it is said that "the absence of all particulars of the alleged scheme renders the count as defective, as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken."

The accused is entitled to the facts and those cannot

be supplied by the conclusions of the pleader unsupported by a setting forth of any facts.

The *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 574, quotes from the *Cruickshank* case that one "object of the indictment is to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

If the indictment "rests upon the mere conclusion of the pleader it is ineffective as proof of the existence of probable cause."

Morse, 287 Fed. at 915.

In *U. S.* v. *Sauer*, 88 Fed. 253, it was said to be gravely doubtful whether the following allegation was sufficient to charge a penal offense. That allegation was:

"So devising and intending in and for executing such scheme and artifice to defraud, and for the obtaining of money under false pretenses and attempting so to do, caused to be conveyed and delivered by mail."

"No conclusion of the pleader can overcome the facts set forth. *U. S.* v. *Conners*, 111 Fed. 734; and see *U. S.* v. *Greene*, 100 Fed. 941.

The court must be able to find the charge of crime 'in the facts alleged, and not in the pleader's conclusions as to logical connection of facts'—and it is not enough that there is a mere allegation that said acts were done pursuant to the conspiracy charged." *Tillinghast* v. *Richards, Marshall*, 225 Fed. at 229, 230, 232.

"The court must not rely on having faith in the pleader's allegation of a bare conclusion. It is for it to determine relevancy upon the facts alleged, and not by the pleader's opinion. If the indictment were permitted to be founded upon allegations which are a conclusion, its *prima facie* effect as evidence of probable cause would be entirely destroyed. *Idem.*

It was also incumbent upon the pleader to describe the scheme or artifice to defraud which had been devised with such certainty as would clearly inform the defendants of the nature of the evidence to prove the existence of the scheme to defraud, with which they would be confronted at the trial."

Tillinghast, 225 Fed. 232.

"It must disclose the particulars of the alleged offense in such manner as to state matters upon which issue could be formed for submission to a jury."

U. S. v. *Hess,* 8 Sup. Ct. Rep. 573, 124 U. S. 483.

"There must be set out clearly and distinctly what the artifice was, wherein the fraud consisted, and the facts and circumstances by which it was accomplished."

U. S. v. *Post,* 113 Fed. 854.

In *Miller's* case, 133 Fed. 341, it is ruled that there is no fair opportunity to defend unless the indictment clearly discloses the facts upon which a charge is based. That is also the fair effect of *Britton* case, 108 U. S. 199, 2nd Sup. Ct. 530, 531.

In *Morse* v. *U. S.* 287 Fed. 913, the charge of conspiracy to violate Section 215, was:

"To commit diverse, to-wit: 1,000 offenses against the U. S. of the kind, under the circumstances, in the manner and by the means and methods following, that is to say: This was followed by a general allegation as to the connection the "principal defendants" had with a certain Steamship Company. It was further charged that the "other defendants" aided, abetted and compelled "the principal defendants"; that these latter were to devise a scheme to defraud and all of them were to engage in the mailing of 1,000 letters and papers for the purpose of executing a fraudulent scheme; that the "principal defendants" were to make certain fraudulent reports in order to induce the public to buy the shares of said steamship company, and averring further alleged fraudulent acts of the "principal defendants." ' "

It is held that this is not sufficiently direct, and that it violates the rule that an indictment should charge a

criminal offense in unmistakable terms free from doubt and not resting upon inference. Surely the indictment at bar departs much further from being a statement in unmistakable terms, free from doubt and one not resting upon inference. The *Morse* case cites with approval from *United States* v. *Dowling*, 278 Fed. 630, that for one thing, the indictment must "enable the court to say as to whether the facts set forth are sufficient in law to support a conviction."

The *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 573, analyses the *Cruickshank* case, 92 U. S. 542, to deal with a general charge in the indictment

that defendants, with intent to hinder and prevent citizens of African descent (named) in the free exercise and enjoyment of all the rights, privileges, immunities and protection given such citizens and so deprived, because these persons were of such descent, and that said indictment specified no particular right the enjoyment of which the conspirators intended to hinder or prevent.

It is declared, the *Cruikshank* case holds, that the aforesaid averments were too vague and general and lacked the certainty and precision required by the established rules of criminal pleading, and were therefore insufficient in law.

A representative allegation declares, so far as a fact charge is concerned, first, placing a letter with described postage in the post office at Sioux City; that the envelope was addressed to one Christianson at Viborg, in South Dakota, the place of his residence; that the placing was done with intent that the mailed matter should be carried by the mails and delivered to Christianson according to directions on the envelope, at the Town of Viborg; that it was there delivered according to direction (22-342). Second, there is an allegation that in aid of the alleged scheme, the defendants "did cause to be delivered by mail by the post office establishment of the

United States, according to the direction thereon, at the Town of Viborg and within the division and district aforesaid and within the jurisdiction of this court," the described letter mailed in Sioux City. It is, to say the least, a fair question whether this means to charge that the defendants caused delivery of the letter to be made while they were at Viborg, or whether in the opinion of the pleader, what they did in Sioux City by mailing with intent that the letter should be carried to Viborg, constitutes a causing of delivery done in Viborg. This ambiguity destroys the indictment. The ambiguity is found in the charging of the jurisdictionals, and jurisdictionals "must be obviously and plainly charged."—*Christopherson*, 261 Fed. at 226. As to jurisdictionals, the court is not to enlarge "by mere inference from the law or doubtful construction of its terms." *Post*, 161 U. S. 583. To like effect is *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, and *In re Terrell*, 51 Fed. 213. And in *Wolf's* case, 27 Fed. at 609, a removal proceeding, it is said that while the very substance of the law is not to be construed away, yet it is to be strictly construed. See *Morse*, 287 Fed. at 913; *Marx*, 122 Fed. at 965.

Passing ambiguity, the indictment is fatally defective because its jurisdictional allegations consist of nothing but naked conclusions of the pleader. The only fact charge other than that of the actual delivery, is a detailed statement as to the time when and the manner in which the letters in question were put into the mail in Sioux City, in the Northern District of Iowa.

For the causing of delivery, there is first the general prefatory conclusion:

"on the dates and at and during the times hereinbefore specified in the District of South Dakota and within the Southern Division thereof, and within the jurisdiction of this court, said defendants having heretofore devised

and intending to devise a scheme and artifice to defraud said corporation and said victims of its money and property by the various false and fraudulent practices, artifices and schemes as hereinafter more particularly set forth." (14-342)

There is nothing more than that defendant for the purpose of executing his scheme did "unlawfully, feloniously and knowingly cause to be delivered" at a named town in South Dakota. (22-342)

Be all that as it may—the charge which is the sole reliance of respondent, as it was in the Stever case, to wit, the knowingly causing delivery, is absolutely charged as a naked conclusion, in the very words of the statute, and without a single fact allegation in support, unless indeed, the fact support was intended to be the mailing in Sioux City. If that is the basis of charging the causing delivery, then the causing was done in Sioux City, and South Dakota has no jurisdiction. If, on the other hand, as was once suggested below, the mailing in Sioux City is merely descriptive of how the letter delivered in South Dakota got into the mails, we have to say, first, that that can scarcely be an adequate explanation, because the letters are copied in the indictment word for word—and it should not be assumed that a letter set out *in haec verbae* was intended to be further described by stating that at a certain time with certain stamping, it was put into the mails in a named town. But if the allegation as to mailing is to be treated as merely descriptive of the letter mailed, then we recur to the fact that the only charge of causing delivery is the naked statement, put in the words of the statute, that defendant did cause delivery.

In *Hess* v. *U. S.* 124 U. S. 483, it is declared that while "undoubtedly the language of the statute may be used in the general description of an offense, it must be accompanied with such statement of facts and circumstances as will inform the accused of the specific offense coming under the general description with which he is charged."

The case quotes from *Cruikshank's* case, 92 U. S. 542, that

"It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species,—it must descend to particulars."

In the *Simmons* case, 96 U. S. 360, the second count pursued the words of the statute and says this:

That the defendant "did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessels for the purpose of distilling, within the intent and meaning of the internal revenue law of the United States, in a certain building and on certain premises, where vinegar was manufactured or produced."

According to the *Hess* case, the *Simmons* case rules that this indictment was insufficient under the rule that "where the offense is purely statutory, having no relation to the common law, it is as a general rule sufficient to charge defendant with acts coming fully within the statutory description and in the substantial words of the statute, without any further expansion of the matter"—but that "to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused be apprised by the indictment with reasonable certainty of the nature of the accusation against him to the end that he may prepare his defense," and that "an indictment not so framed is defective although it may follow the language of the statute."

An indictment for conspiracy "to steal from a certain railroad freight car certain goods then and there moving as and constituting a part of an interstate shipment of freight," *held* fatally defective in not sufficiently identifying the offense which was the object of the conspiracy.

Anderson, 260 Fed. at 557.

It is held in the *Backus* case, 225 U. S. 472, that charges that an immigration inspector submitted evidence of some kind detrimental to petitioner, that this evidence was never presented to petitioner for inspection and was clandestinely forwarded to Washington and by reason

thereof petitioner was denied any opportunity to inspect such evidence or rebut it—are but conclusions without assertion of facts in their support, and that such allegations are insufficient to support a charge of bad faith.

Assume that the allegations as to the mailing done in Sioux City are merely descriptive of the letters mailed—and thus reduce the charge to the statement of the conclusion that defendants caused what was mailed in Sioux City to be delivered in South Dakota—and respondent is confronted with the well settled law just dealt with, to wit, that an indictment will not base removal if it merely charges in the words of the statute, and with the equally well settled law that an indictment which, as to its essentials, asserts nothing but the naked conclusion of the pleader, cannot base a removal.

Division V.

Against all this construction by bench and bar, against all that precedes, is a lone, bald dictum.

Up to the finding of the indictment at bar the *Moffatt* case (232 Fed. 522) is the only case reported in which it was attempted to prosecute in the district of delivery. In that case venue was not mooted.

While the *Moffatt* case reaches a conclusion opposite to what is ruled in the *Stever* case, that conclusion is but a naked conclusion and is as well the baldest of *dictum*. It advances no reason, cites no authority, and it ignores the *Stever* decision, the decision of other courts and the interpretation by Congress.

We submit next that if the *Moffatt* case were not a *dictum* it still could not prevail against a *decision* of the Supreme Court of the United States. More emphatically is that true where the question was squarely presented and in issue in the Supreme Court, and is dealt with by the way of *dictum* only, in the *Moffatt* case.

The case does not claim anything for the continuous offense statute; nor for the doctrine of innocent agency. It is a *dictum* that Section 215 should be construed to give jurisdiction to the district of delivery.

The opinion in the case states that the assignment under consideration urges there should have been a directed verdict because:

"There is no evidence tending to show that the letter upon which the conviction is based 'was delivered by mail according to the direction thereon.'" (Such delivery being alleged.)

It is ruled that the evidence clearly establishes such delivery. Manifestly, the point presented for decision was whether the evidence sufficiently supported said fact allegation of the indictment.

No question as to venue or jurisdiction was made. But in deciding the said fact question, the court seized a question of venue or jurisdiction out of the sky and proceeded to remark:

"The plain purpose in making it an offense to knowingly cause to be delivered by mail, according to the direction thereon, a letter, etc. was to confer jurisdiction upon the court at the place where the letter is delivered to punish the offender, and the statute must not be so strictly construed as to defeat this plain intention of Congress (532). * * * The delivery was in the City of St. Louis, in substantial compliance with such intent and purpose, and conferred the jurisdiction in this case intended by Congress, when it defined the offense."

What occasion was there to make this statement? Who had tendered any question as to what Congress intended the definition of the offense to be, or on whether it gave jurisdiction to punish in the place where the letter is delivered? It would have been precisely as much of a *decision* to have stated that punishing those who misused the mails was sound public policy; or to say that federal courts had jurisdiction to punish violations of

Section 215, and that Congress intended them to have such jurisdiction. It was a statement on a point not presented by the appellant, at no time contested by him, and upon which no argument was made or brief submitted. It was a bald departure from the only question presented for decision. That the remarks of a court under such conditions are not binding law, are not *stare decisis,* and are in no sense a precedent, the law leaves little room for doubting.

In *Cross* v. *Burke,* 146 U. S. 82, 13 Sup. Ct. Rep. at 23, it is stated to what the writer of the opinion in *Wales* v. *Whitney,* 114 U. S. 564, was speaking and thereupon:

"But the question of jurisdiction does not appear to have been contested in *Wales* v. *Whitney,* and where this is so the court does not consider itself bound by the view expressed therein." Citing *U. S.* v. *Sanges,* 144 U. S. 310; *U. S.* v. *Move,* 3 Cranch. 159, 172.

This is followed in *King* v. *Hospital,* 64 Fed. 341. And the case of *Shoshone* v. *Rulter,* 67 Fed. at 810, treats two decisions as *dicta* because in them the question of jurisdiction was not raised.

A court is not bound by expressions in its former decisions on points which were not contested. *Adams* v. *Yazoo* (Miss.) 24 So. 201.

There is no binding decision which deals with a point not presented. *Scottish Ins. Co.* v. *Wade,* 127 S. W. 1186, 1189; *Mulford,* 32 Cal. at 139; *Lewis,* 6 Munf. 87; *Ingham,* 128 Pac. 675; *Buchner,* 60 Wis. 264, 19 N. W. 56, 57; *Rush,* 25 Pac. 816, 825, 826.

A pronouncement on a point which appellant failed to notice and on which no argument or authorities are presented, is *obiter. Lyman,* 161 N. Y. 119. In *Rohrbach,* 62 N. Y. 47, 56, it is said that "dicta are opinions of a judge, * * * made without argument or full consideration of the point." And First Bouvier, p. 568, says of this definition that "probably no better definition can be found." So does *Newman's* case (W. Va.) 57 W. Va. 98, 49 S. E. 926, 931, and see *Brown,* 102 Wis. 137.

Grand Division II.

South Dakota has no jurisdiction because neither defendant was at any material time within that State—and under this indictment, neither constructive presence nor the continuous offense statute, Sec. 731, R. S., is involved.

We concede there are cases where the fact of physical absence is immaterial. Conspiracy may be such a case. But here no conspiracy is charged. A case coming within Sec. 731, may be one. But here the offense if any was completed in Iowa.

What the general rule is is clear:

While it is true that one may be a fugitive from justice even before he is formally accused—*Streep*, 160 U. S. 128, 16 Sup. Ct. at 246, 247, and while it is immaterial with what intent he fled—he cannot be said to flee from the justice of a state if he was never in that state. He becomes a fugitive only by voluntarily withdrawing from a state in which he has committed an offense. To constitute his fleeing from the justice of a commonwealth this must be true:

"He must have committed a crime in the (demanding district) and when sought to be tried by the court having jurisdiction have left the district and be found in another state and district, under circumstances indicating a purpose to evade the authority and jurisdiction of the local courts—*Greene* v. *U. S.* (C. C. A.) 154 Fed. at 411. (Citing *Streep*, 160 U. S. 128, 16 Sup. Ct. 244.)

In *Graham's* case, 216 Fed. at 815, 816, it is said that in the *Appleyard* case, 203 U. S. 222, 27 Sup. Ct. 122, the Supreme Court sums up all its holdings on the point as follows:

"A person charged with crime against the laws of a state and who flees from justice, that is, after committing the crime, leaves the state, in whatever way or for

whatever reason, and is found in another state, may, under the authority of the Constitution and laws of the United States be brought back to the state in which he stands charged for the crime, to be there dealt with according to law."

It is said in *Kurtz* v. *State*, 22 Fla. 36, citing *In re Mohr*, 49 Ala. 63, that the accused may show on *habeas corpus* he was not in Pennsylvania when the crime is alleged to have been committed, nor since, and that he never fled from Pennsylvania and, therefore, is not a fugitive. To like effect is *In re Adams*, 7 Law Rep. 386.

It is essential that he depart from the state after being indicted therein, and is then found in another state. (*Hibler* v. *State*, 43 Tex. 197, 201.)

Essential, that he has withdrawn from the accusing jurisdiction without awaiting to abide the consequences of his act. *In re Voorhees* (23 N. J. L. 141, 150).

He must go into a state, commit a crime, and then go elsewhere. (*Kingsbury's* case, 106 Mass. 223; *Ex Parte Swearinger*, 13 S. C. 74.)

In *Jones* v. *Leonard*, 50 Iowa, 106, it is held that a citizen and resident of Iowa who is charged with having been constructively guilty of an offense in another state upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the Constitution.

The words "who shall flee" must be taken "in their natural and obvious sense, and do not include a case of constructive presence in the demanding state, and constructive flight therefrom, but relate only to a case where the accused is actually present in the demanding state at the time he commits the act of which complaint is made." *Wilcox* v. *Nolze*, 34 Ohio State, 520.

The case of *In re Fetter* (N. J.) 57 Am. Dec. 383, cites all the foregoing and approves them.

Each defendant testified that at no material time mentioned in the indictment was he within South Dakota (42, 43-342).

Whatever be the effect of the indictment, it is open to criticism and contradiction. (*Dana*, 68 Fed. at 896, 897, 890, 943.)

In the *Dana* case, 68 Fed. at 890, reference is made to a Louisiana decision which deals with a conspiracy and in which "proof was admitted before the Commissioner to show that defendant was not in Louisiana at the time alleged." In the *Fowkes* case (C. C. A.) 53 Fed. at 165, the court said:

"It is certain that none could have been committed of which the United States court of Missouri had cognizance. The accused had never been within that state."

True the indictment asserts by way of conclusion that the offense was committed in South Dakota. But the allegations of a pleading have no evidentiary force except that in removal proceedings it is by exceptional grace, admissible as evidence. But surely its conclusions cannot overcome affirmative testimony in opposition to such conclusion, where such testimony is not impeached, and is disputed by nothing save such conclusion.

In the *Morse* case, 287 Fed. at 915, 916, it is ruled that where testimony consisting of the allegation of the indictment is put in in a removal hearing in the District Court, and counter testimony is, as here, undisputed except by such allegation, then such testimony, as matter of law, overcomes any effect the indictment is justly entitled to in the removal proceedings.

Even where an allegation in a pleading is given some sort of evidentiary aspect, it is not stronger evidence than certain so-called presumptions—say, that a deed found in the possession of a grantee has been delivered,

or that the statements in a pleading filed were authorized by the client. As to these it has been generally held that where "a mere inference of fact is met by undisputed testimony that the facts are contrary to the inference, there is no conflict to go to a jury." In other words, such inference or so-called presumption, is, as matter of law, overcome by such testimony. See *Farmers Company* v. *Company*, 184 Iowa, at 780; *Mohn*, 181 Iowa, at 129; *Kauffman*, 187 Iowa, at 681; *Butler*, 186 Iowa, at 1254; *Schaefer*, 133 Iowa, at 209.

So, even if it were competently charged that Section 215 had been violated, such allegation is as matter of law overcome by undisputed testimony found in this record showing that defendant was at no material time in the district of South Dakota.

2.

We again admit that absence from South Dakota might be no defense if this case comes within Section 731, R. S., which provides for elective venue if an offense is begun in one district and "completed" in another—which on the very words of that statute means acting in part in both districts. We have no quarrel with this statute. What we urge is that it is and has been held to be inapplicable here. Our position is that the offense charged is the mailing in Sioux City, that that act was completed there—and that where one offense is "completed" in one district it cannot be "completed" in another—that the statute does not apply because a completed act cannot again be completed—and that any legislative or judicial attempt to prosecute in one district for an act completed in another would violate the Constitution. (12 Cyc. 241, 242.)

The indictment charges no act save mailing in Sioux City (22-342), and that the statute was breached by said

mailing (41-342). The offense completed there, the statute gives no right to prosecute in South Dakota.

It was completed in Iowa, because "causing" is mailing—and the mailing, and therefore, both mailing and causing were done in Iowa. The alleged offense was completed in Iowa because it has been held, in construing Section 215 as amended, that the mailing is still the gist of the offense and the act which alone gives jurisdiction to the federal courts. *Olsen* (C. C. A.) 287 Fed. 89; *Badders*, 240 U. S. 391; *DeBara*, 179 U. S. 316; 21 Sup. Ct. at 112; *Henry*, 123 U. S. 372, 8 Sup. Ct. at 142; *Francis*, 152 Fed. at 156.

It is self-evident that since the act of mailing is a complete offense and gives the jurisdiction, nothing is "continued" after the mailing is done—that, therefore, mailing cannot be a continuous offense unless the one who mails, unlike the defendant, is charged with doing something to help delivery after he has done the mailing. Of this, more, elsewhere.

It is *stare decisis* that Section 731 does not apply to a misuse of the mails. That statute was raised on the record of the *Stever* case and if the court had thought its venue provision applicable, it could not have held, as it did hold, that there was no jurisdiction to prosecute in the district of delivery. It held of necessity that Section 731 was not applicable because if it were, there was right to prosecute in Kentucky; and a holding that Section 731 applied would have necessitated holding that venue lay there, instead of the decision that it did not.

It has been squarely decided that misuse of the mails is not a continuous offense. *In re Henry*, 123 U. S. 372, 8 Sup. Ct. at 142, approved in *Badders*, 240 U. S. 391; *DeBara*, 179 U. S. 316, 21 Sup. Ct. at 112; *Fowkes* (C. C. A.) 53 Fed. at 17; *Francis*, 152 Fed. at 156.

In effect, the instant case does not differ from the case of *Fowkes, supra,* one in which a voucher was signed in one state and a rebate was thereby caused to be paid in another, and where it was held that the venue lay in the state where the voucher was signed.

Part 2-a.

SECTION 731 DOES NOT DEAL WITH CASES WHEREIN AN ACT COMPLETED IN ONE DISTRICT HAD INJURIOUS CONSEQUENCES IN ANOTHER. SO FAR AS IT IS CONCERNED, ITS FUNCTION ENDS IF THE ACT ITSELF BE COMPLETELY DONE IN ONE DISTRICT.

The *Fowkes* case, 53 Fed. at 17, which ruled that Section 731 did not apply, was a case wherein it should be applied if it be the fact that mailing constitutes a continuous offense. Fowkes signed an instrument in Philadelphia which authorized some one in Missouri to there grant an unauthorized rebate. The court declined to remove Fowkes to Missouri because even if the act of signing first became effective in Missouri the signing was an act completed in Pennsylvania. Had the court deemed such signing, plus the injurious consequences which occurred in Missouri, to constitute a continuous offense, it would have ordered removal to Missouri—and by refusing such order the court necessarily held that though the act completed in Pennsylvania first became injurious in Missouri this would not make the act done in the first state a continuous offense completed in the other. The court said:

"But it has been argued that the offense charged though begun in the Third Circuit was completed in the Eighth Circuit and that therefore under 731 R. S. it might be tried in either. In our opinion, however, the facts of the case do not bring it within the terms of the operation of that section."

In the opinion rendered by Justice James in the case of *U. S.* v. *Guiteau,* 1 Mackay, 544, 545, and also by Justice Hagner, in the same case (pages 553, 554) both express the opinion that the constitutional provision is to be interpreted on grounds "independent of the common law," and with reference only to the "place where the manifest act of the defendant was done"—"where his active agency was employed"—and that it "forbids trial in a district where the ultimate consequences of his act happened, but where he does not act." (And see Cooley, Const. Lim., 320 note.)

The *Dana* case, 68 Fed. at 888, approves the statement of Judge Cooley that in the light of the fact that one cause of the revolution was the assertion of a right to send parties abroad for trial, it would be remarkable—

"if it should now be found an editor may be seized anywhere in the Union and transported by a federal officer into every territory in which his paper may find its way, to be tried each in succession, for offenses which consisted in a single act, not actually committed in any of them."

Applying the foregoing to the concrete case and it follows that where the only *fact* charge is a mailing done in Sioux City, a mailing there completed the offense. That the injurious consequences first came into existence in South Dakota cannot change the truism that an act completed in Iowa cannot be further "completed" in South Dakota.

It all sums to the proposition that Section 731 does not touch what is completed in one district. The very words of the statute leave no room for any other interpretation. It deals only with offenses that are "begun in one judicial district and completed in another." Manifestly, this makes alternative venue depend on acting partly in one district and partly in another. Cases that

apply the statute exhibit such double action. See *Putnam,* 62 U. S. 687; *Davis* (C. C. A.) 104 Fed. 136; *Buell,* 3 Dill. 116; *Conrad,* 59 Fed. 458; *Belknap,* 96 Fed. 614. The test is not where the act done first attained criminality or became injurious, but whether the defendant acted in more than one district to accomplish a completed offense.

Part 2-b.

IF CONSEQUENCES MADE VENUE, UTTERLY ABSURD PROCEDURE WOULD BE SANCTIONED.

If the fact that the consequence of the mailing in Iowa was a delivery in South Dakota permits prosecution in the last named district, it must be held that the consequences of an act as well as the act from which the consequences flow fix the place of trial. The adopting such a theory would have startling results.

The Supreme Court well said in a recent case:

"The government, however, contends that 'with few exceptions every crime has continuity.' But the law, being essentially practical, does not regard every crime as continuous for the purpose of jurisdiction. * * * For practical purposes it usually suffices to punish where the actor began."

If said declaration of the Supreme Court does not state the true rule as to venue, utter absurdity in fixing a place of prosecution would be sanctioned. Any offense completed in one district could be prosecuted in any other wherein said completed act was followed by its natural consequences. If that is the law why has removal to the district of delivery been refused in libel prosecutions? Why was there the pronouncement that was made in the *Guiteau* and the *Dana* case?

On the theory that the effect creates venue, a seduction committed in Iowa would be punishable where the child

of the seducer was given birth. Counterfeiting done in Missouri could be punished in Iowa if the counterfeiter intended that his product should be and it was floated in Iowa by an innocent agent. For a note forged in one state the forger could be prosecuted for the forgery in any state where the note was uttered. In a word, every time an act was completed in one district prosecution would lie in any other district wherein occurred any result of what was completed in the first. The mere suggestion makes plain why "for practical purposes it usually suffices to punish where the actor began," and that prohibiting the causing of delivery will on no permissible construction permit punishment in the district where delivery, not caused therein, occurred.

To repeat—this would nullify.

Whatever was true at common law under our constitution, prosecution must be had "where the manifest act was done or his act or agency was employed." And defendant may not be tried "for offenses which consisted in a single act" in some district in which that act was "not actually committed." Guiteau; Mackay, 544-45-53-54; Cooley Constitutional Limitations *320 (Note).

And the analogy of the case of firing a shot on one side of the line that killls on the other side, is faulty. In that case the ultimate crime is the killing. And it is clearly done by an act begun in one place and completed in another. The firing of the shot is, of course, not the murder. At the time it is fired no murder has been done. The result of the shot, the killing, is done in the territory in which the bullet strikes. A better illustration is to suppose a statute which prohibits the firing of a weapon with intent to kill. In that case the firing would complete the offense denounced, and that would be so though the consequence of the prohibited act occurred elsewhere.

Part 2-c.

THE LEGISLATIVE CONSTRUCTION IS THAT SUCH WORDS AS "CAUSE TO BE DELIVERED" WILL NOT CREATE ELECTIVE VENUE EITHER ON THE THEORY THAT SUCH CAUSING IS A CONTINUOUS OFFENSE, OR ON ANY OTHER THEORY.

The lottery statute has the words "causing to be delivered." If thereby a continuous offense was created that fell within the alternative venue provision of Section 731, what need was there to insert in addition to the quoted words an express provision for elective venue.

The Mann Act has the equivalent of those words, to wit, it prohibits "causing to be transported," etc. If "causing" created alternative venue by means of being a continuous offense, it was idle to put into this act an express provision giving elective venue.

Division II.

It is stare decisis and is the fact that the doctrine of innocent agency has no application. For even if an innocent agent made delivery in South Dakota, the causing delivery, i. e., inducing the agent to act, was, so far as defendant was concerned, done by mailing in Iowa.

Stare decisis disposes of the innocent agency theory. If that doctrine were applicable, it was just as fully so in the *Stever* case, and in the *Stewart* case, 119 Fed. 89 (C. C. A.); and both of these hold that venue lay in the district of mailing, only.

What follows is in a sense of repetition of what has already been elaborated, to wit, that "causing delivery" is not delivery—and that, therefore, the venue lies wherever the "causing" is done.

Grant, for the sake of argument, that steps to bring about delivery, taken by an agent after the principal has deposited, would make the principal guilty whether the agent acted knowingly or innocently, it still remains true that the agency is created and set in motion only by the depositing; that, therefore, even if the principal procured an innocent agent to take steps that would result in the delivery, the creation of the agency and causing the agent to deliver necessarily took place where the acts were done that induced the agent to do what brought about a delivery.

We hope that this point will not be dealt with under a misapprehension of our exact position. We do not claim that a guilty principal can escape because he has accomplished his wrong by using an innocent agent. What we have is not a question of *respondeat superior*, but of venue. Delivery is not punishable, causing it is the offense. Causing delivery by an innocent agent is, under the indictment at bar completed when such agent is employed to deliver and is punishable only where he was employed. To be sure, if after employing the employer does something more to cause the agent to make the delivery, prosecution might lie where that additional thing is done; but that is moot. So far as this indictment is concerned defendant stopped after he had caused delivery; after the act of employing (mailing) done in Sioux City.

Grand Division III.

Where an indictment is returned in a division in which no offending is charged, such an indictment is void because of the provisions of Section 53 of the Judicial Code—and such an indictment cannot base a removal.

South Dakota has a Western Division and a Southern Division. (Judicial Code, Sec. 106.)

The indictment shows on its face that it was found and presented in and by a grand jury sitting for the Western Division. It charges that the offense was committed "within the Southern Division." (14-342, 3rd par.)

Section 53, Judicial Code, provides that "all *prosecutions* shall be *had* within the division of such district where the same were committed."

Our contention is that "prosecutions" includes both indictment and trial—wherefore the provision that prosecution is to be had in the division in which commission is charged commands that indictment must be returned there. The view of the *Biggerstaff* decision, 260 Fed. 926, is that said word deals only with the proceedings after indictment, that therefore, there is no provision as to the place of indicting, and that, so, it is permitted to indict in any division of the district. Said decision declares:

"The point made turns upon the meaning of the word 'prosecutions' as employed in the statute—whether this word includes the finding of the indictment."

It holds that the word as used in this statute does not include the finding and return of the indictment, but refers only to the proceedings that follow "the making of the accusation."

The conclusion is that the word is used in Section 53

"in this restricted sense," though it is conceded that "in other relationships it may have a broader meaning."

The point at issue, then, is, whether the word "prosecution" as employed in Section 53, does or does not include the finding of the indictment.

Criticisms of the *Biggerstaff* decision are reserved for another place. For the present, we shall proceed as if said decision did not exist. And we go at once to the decisions that hold, and the reasoning that supports a holding, that Section 53, Judicial Code, renders the indictment at bar void; and go also to a consideration of what effect its being void has.

The *Beavers case*, 194 U. S. 85 (top), rules:

"And the place where such inquiry must be had and the decision of the grand jury obtained, is the locality in which, by the Constitution and laws, the final trial must be had."

Ex Parte Morgan, 20 Federal, at 308, is an extradition proceeding. In such, the prosecution has greater rights than the government has a proceeding to remove under Sec. 1014 R. S. What is said in the Morgan case is approvingly quoted in *Ex Parte Cheatham*, 50 Tex. C. R. 51; 95 S. W. 1077, 1081—and it is this:

"There is nothing on the face of the papers which were before the Governor to show that a Court in the Cherokee Nation had jurisdiction to try Morgan for the crime of murder. It must appear to the Governor honoring the requisition that the tribunals of the demanding state or territory had jurisdiction to try, or else how can a charge of crime be legally made. Charged with crime, in legal parlance, means charged in the regular course of judicial proceedings. A man cannot be legally charged with crime when there is no jurisdiction to try him. The fact that he is so legally charged, means that he is charged by an authority having a right to try." * * * There should be no extradition, because it does

not appear "that he could be tried by the courts of the Cherokee Nation."

In the case of *Christopherson*, 261 Fed. at 926, it is said:

While it is charged that the corporation has its chief office and place of business "in the division and district wherein the indictment in this case was found, it is not obvious nor is it plainly charged that the offense for which the defendants here stand indicted occurred in said *division* and district."

The case of *U. S.* v. *Chennault*, 230 Fed. 943, holds, on the authority of *Post* v. *U. S.* 161 U. S. 583, 16 Sup. Ct. 611, and *Virginia* v. *Paul*, 148 U. S. 107, 13 Sup. Ct. 536, that, because of Section 53, Judicial Code, an indictment cannot now be found in a division other than the one in which the offense was committed.

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Notes the conflict between the case of *Chennault* and that of *Biggerstaff;* says it would seem the *Chennault* case gives the correct rule; that, at any rate, cautious defenders will never allow their defendant to go to trial on an indictment found in a division other than that of commission—and that the basis for this declaration is not only a resting on statute but, by implication, on the Constitution.

The statute construed in the *Post* case, 161 U. S. 583, is:

"Criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the District of Minnesota shall be brought, had and prosecuted in the division of said district in which such offenses were committed."

The provision of Section 53, Jud. Code, is:

"All prosecutions for crime shall be had within" the division of commission.

The *Post* decision is that under the first statute, the one construed in it, the return of indictment in the wrong division goes to the jurisdiction of the court. In *Rosecran's* case, 165 U. S. 257, 17 Sup. Ct. at 304, it is said:

"Some of these later acts specifically limit the jurisdiction in criminal actions to the courts held in a division of the territory in that division,"—and, that while this was not so under an earlier Minnesota statute, on the authority of the *Post* case, said last statute so limits jurisdiction.

Dwyer v. *U. S.* 170 Fed. 163, speaks to the *Rosecrans* case and repeats what has just been quoted. (See page 64.)

The *Chenault* decision asserts that the statute construed in the *Post* decision, and Section 53, are identical. We believe that assertion to be true and that we can demonstrate that the two statutes are for all practical purposes identical—and that, therefore, the *Post* case rules the one at bar. If both statutes had the words "criminal proceeding," etc., or both had the words "or prosecution for crime," it would not be denied that a construing of those words found in one of these statutes, would be a construction of the same words found in the other. It is equally undeniable that a construing of words in one statute is a construction of words of like import found in another statute.

In *terms,* there are two differences between the statute construed in the *Post* case, and Section 53. The one construed in the *Post* case deals with "criminal proceedings instituted for the trial of offenses"; Section 53, with "prosecutions for crime." This difference creates no distinction, for of course, while criminal proceedings instituted for the trial of offenses may include more than prosecutions for crime, surely every prosecution for crime is a criminal proceeding.

"The well understood legal significance of the word 'prosecution' is a criminal proceeding at the suit of the Government." *Tennessee* v. *Davis,* 100 U. S. at 269, top par.; *Ex parte Fagg* (Tex. Cr.), 44 S. W. at 297, 2nd par., right col.

"The word 'prosecution' * * * usually denotes a criminal proceeding." Miller, J., in *Ulrici,* 3 Dill. 532;

Matthews, 23 Fed. at 75; *Reisinger*, 128 U. S. 398, 9 Sup. Ct. at 101, at top, right col.

The second difference is that while Section 53 deals with prosecutions for crime that are "had" within the division of commission, the statute construed in the *Post* case has the words "brought" as well as "had."

It is difficult to understand how a criminal proceeding or prosecution may be "had" unless it is "brought." It would seem that using the word "brought" in addition to the word "had" is mere tautology—is, at any rate, merely the exercise of an abundance of caution. (Something sometimes found in statutes—*Lennon*, 150 U. S. at 398.) The very word "prosecution" proves that much. It is hard to believe that the word refers to the middle of the proceedings, to wit, the trial, and to the end, to wit, the conviction and sentence, but has no reference to the beginning, to wit, the bringing of the accusation. It is naturally difficult to find case law for so self-evident a proposition, but the case of Whitney, 1 Hill (N. Y.) at 663, comes close. Its reasoning fairly holds that the "persisting in and carrying on" the suit makes a liability for costs under a statute imposing costs upon one who "brings" the suit—one way of saying that the commencement of, is part of the suit.

Division II.

If the Post Case Had Never Been Decided, It would Still Be True That Under Section 53 an Indictment Is Void Unless Returned in the Division Wherein Offending Is Charged.

Though Section 53 does not have the word "brought," it still commands that whatsoever is a prosecution for crime, shall be *had* within the division of commission. Without reference to the *Post* decision, it is the law that

statute-made divisions are for practical purposes a subdistrict, and, therefore, that return of indictment with reference to division is governed by the same requirements that obtain with reference to the return of indictments as between districts.

In the *Goldman case* (C. C. A.), 271 Fed. 843, it is said:

"The acts of Congress treat the divisions of a district unless otherwise provided, as separate districts, for jurisdictional purposes."

In the *Rosecrans case*, 165 U. S. 257, 17 Sup. Ct. at 304, it is said:

"Some of these later acts specifically limit the jurisdiction in criminal actions to the court held in a division of territory within that district"—and while this was not so under earlier special acts dealing with Minnesota, the statute construed in the *Post* case so limits jurisdiction.

To like effect is *Dwyer* v. *U. S.* 170 Fed. at 163. In Section 51, Rose, Fed. Indictments, it is said that Congress has in various ways, to accomplish that purpose, established in two-thirds of the district what are legally known as divisions and which for some purposes are subdistricts; that by other acts the divisions were made so distinct that each of them was in fact a subdistrict—and that the *Chenault* case rules Section 53, Judicial Code, gives that status to all divisions, and rules that said statute had given to all divisions the status of a district where, before, some of them did not possess it.

We start, then, with the proposition that the indictment must be returned in the division of commission for the same reason that it must be returned in the district of commission—that the statute-made division is for jurisdictional purposes a subdistrict. If that be so, an indictment returned in the wrong division is as much a nullity as one returned in the wrong district.

The same result is reached if Section 53 commands the

indictment to be returned in the division where an offending is charged. If that be its command, a disobedience to it makes the indictment a nullity. It is elementary that divisional jurisdiction depends upon express legislation. *Barrett,* 169 U. S. 218, 18 Sup. Ct. at 327, 329; *Rosecrans,* 165 U. S. 257, 17 Sup. Ct. at 304, 305; *Dwyer,* 170 Fed. 160, 164. Not only does the jurisdiction depend upon such grant, but it is limited to whatever grant is given. That, too, is elementary, because federal courts have no jurisdiction except such as is granted. *Hopkins,* 199 Fed. at 651. Section 53, Judicial Code, is an express grant of power dealing with the return of indictment. The terms of the grant are that prosecution shall be had in that division. So if "prosecution" includes "indictment," then, without reference to the *Post* case, indictment must be returned in the division of commission.

Most exhaustive research has failed to find a single decision wherein it was so much as intimated that the presenting of the indictment is not, at least, a part of a criminal prosecution.

It is settled that it is a part of such prosecution.

In *State* v. *Williams,* 24 La. Ann. 1200, it is held that a prosecution is pending "from the moment the papers in a criminal case are returned to a criminal court," and it is said that this is true because from then on "the accused is under the consideration of that court whence he cannot be removed or released but by order of that court." That being so, it is not surprising that the presentment of indictment is universally held to be a prosecution or at least a part of one.

"Standing by itself, prosecution has a larger significance than indictment."—*Haas,* 57 Pa. St. at 445; 32 Cyc. 728. But that is immaterial. For though prosecu-

tion may mean more than indictment, it suffices that indictment is included in the definition of prosecution.

"An indictment is a prosecution."—*Haas*, 57 Pa. St. at 445; 32 Cyc. 728. While, to be sure, to "prosecute" means to make complete prosecution, in that, is included the institution of suit.—*Davis* (Mich.), 111 N. W. at 777. And the meaning of prosecution is not limited to what carries on the suit until a remedy is obtained.—*Clinton* (Kansas), 55 Pac. 854. "Prosecution" includes the institution or commencement thereof.—32 Cyc. 728. And while prosecution is also the continuation of a criminal suit, it is still "the institution or commencement of it."—32 Cyc. 728. Indictment is the whole or any part of the procedure provided by law for bringing offenders to justice. 32 Cyc. 728; *Fagg* (Tex. Cr.), 44 S. W. 294. It is one part of a prosecution—a part "of one constitutional proceeding for bringing the accused to trial."—*Dana*, 68 Fed. at 895. It is one of four methods of prosecuting.—Bish. New Crim. Proced. (4th Ed.), Sections 129a, 130; 12 Cyc. 290. The Constitution of Louisiana (1913) commands that prosecution shall be by indictment or information; and Article 1, Constitution of New York, that a crime "must be prosecuted by indictment."

Indictment is the institution of a criminal proceeding, because a grand jury cannot inquire except in the place of commission—wherefore, crimes must be prosecuted there.—1 Bish. New Crim. Proced. (4th Ed.), Section 129. And see *Beavers*, 194 U. S. top 85. The making of an accusation is the first act in a prosecution.—Bouvier, 710. In First Bishop New Crim. Proced. (4th Ed.), Section 129a, indictment is dealt with under the head of "The county or district of prosecution," and it is declared that the matter dealt with is the jurisdiction of the courts with reference to the territory in which the proceeding "is to be instituted."

No prosecution is commenced until there is an indictment.—Paul, 148 U. S. 107, 13 Sup. Ct. 539, 541, 542, in approval of a statement by Mr. Justice Grier. Speaking to "costs of prosecution" it is said in *Smith's* case, 240 Fed. at 757, cited in the *Post* case, that there is no "cause" in the court until indictment is filed. And according to the case of *Beavers,* 194 U. S. 85, 24 Sup. Ct. 607, left col., 3rd par., the Constitution requires an indictment "as a prerequisite to a trial."

Since indictment is a prerequisite to trial, that is, there can be no trial without indictment, and since trial is confessedly covered by "prosecution," indictment must be a part of a prosecution, and, therefore, of a criminal proceeding. And in defining the term "prosecution" there is no more right to disregard the first part of it, than to disregard the middle or the last. Of course, trial and sentence are parts of a criminal proceeding. But not more so than the institution of the proceeding, the indictment. And what is true of such proceeding is as true of a prosecution. Wherefore, in holding as to a criminal proceeding that the indictment must be returned in the division of commission, the *Post* case decides as well that the indictment in a prosecution must be there returned.

In a word, as a prosecution is a criminal proceeding, whatever is decided as to such proceeding is also decided as to a prosecution. Whatever governs the beginning of a criminal proceeding governs the beginning of a prosecution.

Part 2-a.

OTHER REASONS WHY "PROSECUTIONS" IN SECTION 53 INCLUDES THE RETURN OF INDICTMENT.

a.

If Congress intended by using the word "prosecute" to exclude indictment, it intended what is an exception to the usual meaning of that word. The claim is that it created such an exception by using said word. Surely, that has not been the manner in which it usually has made exceptions. As said in the *Rosecrans case,* 165 U. S. 257, 17 Sup. Ct. 305 (top), Congress is not to be held by implication to have changed the law where it appears that it "in some cases has made express provision for effecting a change."

It is "an old and familiar rule" that a general rule stands until an exception is specifically engrafted upon it. See the case of *Chase,* 135 U. S. 255, 10 Sup. Ct. at 757, 758. Nothing in Section 53 of the Judicial Code indicates any intention to take the divisions of South Dakota out of the general rule established by Section 53. It is an equally familiar doctrine that when an exception is adopted, this amounts to legislative construction that before the latter enactment no such exception existed. For, of course, it should not be held that a specific exception later created was but intended to repeat some part of a pre-existing general statute. *Chase,* 135 U. S. 255, 10 Sup. Ct. 758 (right column), par. 1.

It will be difficult to reconcile what was done later than the enactment of Section 53, with the position that Section 53 permitted a transfer in all cases, including one from a division in which no offense was committed to the one in which the offending was charged.

Now, Sections 92 and 100 of the Judicial Code, respectively, provide for transfer from one place of sitting in

Montana to others; and that a sitting in Dayton, Ohio, may deal with all prosecutions for offenses committed in any part of the district in which Dayton lies. Manifestly, these two sections which are later than Section 53, do, and for the first time, create exceptions to Section 53. Congress must have been of the opinion that the general rule of Section 53 had no exceptions, else it would not have later enacted Sections 92 and 100. It evidently thought it necessary to authorize by these later statutes something which could not be done under Section 53. It follows that when it gave a permission that a sitting in Dayton might deal with all prosecutions for offenses committed in any part of the district in which Dayton lies, it declared thereby that no general venue existed under Section 53. It is equally clear that in providing for transfer limited to between places of sitting in Montana, it thereby declared that with the exception of Montana, transfers should still be governed by Section 53. If these interpretations be unsound, then it must be held that Sections 92 and 100 were not intended to accomplish anything—were intended merely to govern subjects fully covered by Section 53—had for their object to permit in particular instances what was already permitted in all cases. Of course, it is one accepted canon of construction that no presumption will be indulged that the legislature intended to do something that it was idle to do.

b.

The statute construed in the *Post* case dealt with nothing but "criminal proceedings for the trial of offenses against the laws of the United States." "Criminal proceedings" includes "prosecution for trial." The statute construed in the *Post* case then dealt with nothing but such prosecutions. Yet the point decided was where was the proper place for the return of an indictment. If indictment is no part of a criminal proceeding nor of a

prosecution for crime, why did the Supreme Court decide what it did?

On the theory of the *Biggerstaff* case, the decision should have been that the indictment was no part of a criminal proceeding or of a prosecution for crime and that, therefore, the statute in review did not deal with indictment, at all. Therefore, and on that theory, the court should not have determined whether an indictment lodged in one division rather than in another was one which the court had no jurisdiction to entertain. Instead of that, it declared that the division was material. It makes no difference that by possibility the statute construed differs from Section 53. The court did deal with division lines. It held that such lines were vital on the place of returning indictment. It therefore held of necessity that an indictment was referred to in a statute dealing with nothing but criminal proceedings, *i. e.*, prosecution for crime.

c.

On every theory *trial* must be had in the division of commission. (60, *ante.*) It would seem to follow the indictment must be returned in that division, for otherwise defendant could put in bail, refrain from moving a transfer to the division of commission and thus be never tried; for on no theory may he be tried in a division other than the one of commission, except on his motion. Whatever may be claimed for the place at which indictment may be returned, there can be no claim that trial can be had except in the division of commission, unless it be on the application of defendant. It follows inevitably that the true construction of Section 53 is that it contemplates both indictment and trial in that division, with permission for the defendant to have the trial moved from that division into some other. On this construction, the failure to have trial becomes impossible. If the indictment is re-

turned where it may lawfully be, then, though defendant moves no transfer, he may lawfully be tried where lawfully indicted. Unless that is the true construction, defendant has the privilege of preventing being tried. If he does not exercise the right to have transfer, which right he alone has, he will on the theory of the *Biggerstaff* decision be lawfully indicted where he cannot be tried, unless he moves a transfer. That cannot be the true interpretation of a statute command that prosecution must be had in the division of commission.

d.

Whatever "prosecution" may mean, the statute does provide that it shall be had in the division of commission "unless" defendant has "the cause transferred for prosecution" to another division of the district. We contend that no one can have a transfer except *from* the division where the indictment is rightly brought to some other division. Be that as it may, no one but the *defendant* can have a transfer, and his right is created by his being a defendant. There is no defendant until the prosecution has been initiated; and in felony such prosecution can be instituted by indictment only. Giving a defendant the right to transfer, necessarily presupposes that he must first be made a defendant. The return of the indictment gives him that status. It is the existence of a prosecution that makes him a defendant. Therefore, the indictment is a prosecution, even in Section 53. For it is that statute that gives the right to transfer, and it gives it only to one who has been made a defendant, because indicting him has caused him to be under prosecution.

e.

Again, the annotators to Section 53 made a report accepted in the *Biggerstaff* decision, and to the effect that

a certain Arkansas Act was in some manner put into Section 53. That act deals in terms with *both* indictment and trial. If it was the purpose that Section 53 should not deal with anything but trial, it was not only idle to include the Arkansas Act, which dealt with both indictment and trial, but the inclusion injected into Section 53 a contradiction. That is to say, on that theory, Congress put into the new statute a provision dealing with both trial and indictment, with the intention that the new statute should apply to nothing but trial.

f.

Who has ever contended that a valid indictment might be returned *in a district other than the one of commission?* And yet the Constitution has an express limitation to trial which is not found in Section 53. In other words, there is much more reason for claiming that indictment may be returned in a district in which no offense was committed—that the limitation is merely that trial shall be had in no other district—than there is for claiming that though here the word "trial" is not used in the division limitation, that yet that limitation refers to trial, only.

Section 53 uses the word "prosecution" and it must be conceded that usually that word includes both indictment and trial. Had that statute used the word "trial," and no more, instead of the broader word "prosecution," there would be stronger reason for holding with the *Biggerstaff* case that the limitation as to division applied only to proceedings subsequent to the accusation. But as said, it does not use "trial" but the broader, "prosecution."

Article 3 of the Constitution, which provides in what district an offender may be proceeded against, uses the word "trial." It declares that trial shall be held in the

state and district of commission. That affords a stronger reason for claiming that the limitation does not begin as early as indicting—a stronger reason for asserting the rule of the *Biggerstaff* case.

Part 3-b.

IT IS NOT THE HABIT OF CONGRESS TO DEAL WITH "TRIAL" BY INDIRECTION; NOR TO CREATE EXCEPTIONS TO THE SCOPE OF USUAL DEFINITION BY ANYTHING OTHER THAN PLAIN WORDS.

Legislative history discloses this:

Congress has not been in the habit of using "prosecution" as a synonym for "trial only." Section 59 Judicial Code provides for a transfer out of the division of commission, but it is found necessary to say that it is a transfer "for trial."

The Arkansas Act of June 2, 1906, gives a certain class confined in jail the right to be indicted and to be tried in a division other than the one of commission. But it does so by two parts, one of which says that the right is to transfer "to the end that trial may be had," and the other part, that the right is to have a transfer for submission to a grand jury for *indictment*. And the word "trial" is used in the act dealt with in the case of *Moran*, 27 Sup. Ct. 25.

The statute considered in Logan's case, 144 U. S. 263, 12 Sup. Ct. 627, provides that "all prosecutions in either of said districts for offenses against the laws of the United States shall be tried," in a described division. Evidently Congress did not in this understand that "prosecutions" fixed a place for trial, or it would not have added this express provision as to trial.

Article III of the Constitution limits the place of trial to the state of commission. But it does not make the regulation by using the word "prosecution." It uses

"trial," in terms. The Sixth amendment exhibits a construction which declares that "criminal prosecution" regulations are not a fixing of a trial place, for it deals in terms with such prosecutions and adds the accused shall have "the right to be tried" in the district of commission. On the *Biggerstaff* theory, the only provision necessary was just that "criminal prosecution" should be had in such district. Evidently, the framers did not give "prosecutions" the definition of that decision or there would not have been made said addition fixing the place of trial, in terms.

Section 1014 provides for the arrest and detention of any person wherever found, but adds, in terms, "for trial" before the proper court.

Haas v. *Henkel,* 54 Law. Ed. at 473, 216 U. S. 462.

Section 53 does not have the word "trial." No good reason appears for believing that the general course of plain expression was abandoned in enacting Section 53, and that there, for the first and only time, Congress used "prosecution" to signify "trial only."

Division III.

We now reach the proposition that the Biggerstaff decision is so unsound as that it should not be accepted as a precedent.

It couples the holding that "prosecutions" usually includes indictment with the claim that, in Section 53, the meaning of the word is limited to the proceedings that follow indictment. For this extraordinary claim it cites no authority—and it ignores the *Post* case in this court and the *Chenault* decision by the District Court of the Eastern District of Louisiana. And surely, it strains construction against liberty, when strain, if employed at all, should be in favor of liberty.

If there is to be a straining at all, it should be to give the word its accepted meaning. As said in the case of *Hass*, 57 Pa. St. at 445:

"Astuteness must not be employed to negative or take away a defense granted by law to a party accused of crime."

In this case the court had to consider the effect of provisos, and found their existence indicated clearly that the term "prosecution" was intended to be a synonym for "indictment." In that connection, and as one reason why the provisos should be given said effect, it was said:

"An indictment is a prosecution though, standing by itself, prosecution has a larger significance."

In the *Post* case, 161 U. S. 583, it is said that in all cases where life and liberty is affected by proceedings before the court and on the question of its jurisdiction, "its authority in these particulars is not to be enlarged by any mere inferences from the law or doubtful constructions of its terms."

It is an elementary rule of construction that in dealing with jurisdictionals, statutes are construed strictly against jurisdiction. The *Biggerstaff* decision is a strained effort to construe a federal court into jurisdiction. (See 161 Fed. at 926.)

Part 3-a.

THE REASONING OF THE BIGGERSTAFF DECISION DIVIDES INTO MATTERS THAT ARE UTTERLY IRRELEVANT, AND TO REASONING FROM A FALSE PREMISE.

The *Biggerstaff* decision assigns a number of reasons. They utterly fail to give the decision any standing. For while what is given as a reason may be conceded to be a statement of what is true, it is also a statement of what is utterly irrelevant. The question was whether "prosecution" included indictment. These reasons have as

much to do with that question as if they had consisted of a statement that Columbus discovered America. These "reasons" are the following:

"If the indictment was lawfully found in the Omaha division, it was lawfully returned there."

That this is so of an indictment which *was* lawfully returned in a given division of course throws no light on whether a given indictment *was lawfully* found in the division where found.

"The return of an indictment is naturally made in the court and at the session where the grand jury is performing its functions."

On this, a grand jury sitting in Chicago can validly indict for an offense committed in Des Moines, because it made return where it was performing its functions.

"Except as to some fundamental requirements in respect to the Constitution and conduct of grand jury, the persons finally indicted are not entitled to subject their proceeding to the scrutiny and test of a trial."

What light does this throw on whether "prosecution" as used in Section 53 excludes indictment?

"There is no case or cause against the accused to be prosecuted" until accusation is made.

How does the fact, if it be one, that no prosecution exists *until accusation* is made by indictment, establish that the return of an indictment is no part of a prosecution?

"It is the process on indictment which brings them into court to answer the accusation."

That process on the indictment brings the accused into court to answer does not tend to establish that though indictment has been returned, no prosecution exists.

"The probability of commission of public offense and of the identity of the perpetrator may not be ascertained" until the grand jury finishes.

What has that to do with whether "prosecution" includes or does not include the return of the indictment?

The inquisition though essential is but preliminary "and is not a part of the definite prosecution of any particular individual."

Though it may be true that until the grand jury concludes the investigation it may remain unsettled whether there is probability that a public offense has been committed, and though before then the identity of the perpetrator may not be disclosed and it remain unsettled whether any particular individual will be properly subject to accusation, and though the precise nature of the offense and the offender are normally developed at the conclusion and not at the beginning of the grand jury investigation—what has uncertainty before indictment is returned to do with whether its return is or is not a part of a prosecution? Whatever doubt there may be until final action by the grand jury, by the time it *does* take such action, whatsoever it doubts, if any, as to the identity of the offender and the precise nature of the offense to be charged, have been resolved.

"Indictment is no part of the trial."

Dwyer, 170 Fed. 162, 163.

How does that prove that indictment is not a part of the "prosecution"?

b.

But the decision does make one argument which is relevant to its claim that "prosecution" is not used in Section 53 in its usual and accepted meaning both in law and by the layman. The basis of the claim is that a certain special Act dealing with Arkansas was included in Section 53. That Act enabled prisoners confined in the Fort Smith Division to obtain transfer for either indictment, trial or both, if unable to give bail and desiring to plead guilty. It is truly pointed out in the decision that if the sitting of the court in the Fort Smith Division was some-

time away, and the court was then sitting or soon to sit in a division other than Fort Smith, it was a benefit to prisoners in that situation and state of mind to be permitted to transfer to where they could at once be sentenced and enter upon their punishment. Because this was a benefit to this class, and it might be a benefit in some cases to permit transfer from one division to another, the decision bridges all gaps by declaring that Section 53 should be construed as this decision construes it, because, unless that be done, the advantage of such transfer would be lost. In other words, it might be beneficial in some cases, if defendant were permitted to obtain a transfer where he has been indicted in a division in which he did not offend. Therefore, to save this advantage, it should be ruled that under Section 53 an indictment may lawfully be returned in a division in which no offending is charged, to the division wherein it is charged. Now, it is obvious that the entire foundation of this benefit argument rests upon the assumption that Section 53 *does* permit a transfer *into* the division of commission. All this argument falls with the premise. Section 53 does provide for a transfer, but for none except one *out of* the division of commission.

It provides that the prosecution must be had within the division of commission *unless* defendant applies for a transfer "for prosecution" to "another division of the district." Now, if the prosecution must be had in the division of commission, unless the transfer is obtained, necessarily, it remains there until transferred—is there in the first instance. Being in the division of commission, it of course cannot be transferred *to* that division, for it is there to start with. The statute then is that the prosecution must in the first place be lodged in the division of commission, and the provision for a transfer is, of necessity, one not into but out of that division. But if

that were not enough, another provision of the statute makes the point too plain for argument. That provision is that when a transfer is ordered and the papers have been transmitted to the other division, "thereupon the cause shall be prosecuted within the said division in the same manner as if the offense was committed therein."

Now, clearly this deals with transfer from the division of commission. If it dealt with one to that division, the foregoing provision would not have been made. For, necessarily, the statement that the proceeding after transfer should be had in the division to which transfer was made as *if* the offense had been committed therein, is a declaration that the transfer is to a division other than the one of commission. As to the division of commission it would never have been provided that the prosecution in the division to which transfer was made, should proceed as if the offense had been committed therein. Obviously, the statute intends a transfer out of the division of commission, only, for if it had contemplated the division of commission, it would never have provided that the prosecution therein should proceed as *if* the offense had been committed therein. If committed at all, there is no "if" about it. Whatever was committed in the division where committed, *was* committed there.

c.

Much stress is laid in the *Biggerstaff* decision on the report of the annotators or codifiers on Section 53, wherein it is recited that the section includes many special acts and gives to all of them a general application. One of the acts included was an Arkansas Act, which provided that prisoners confined in Fort Smith, who were unable to give bail and desired to plead guitly, might have a transfer to a division other than the one of commission, for both indictment and trial. We submit that the report

as to inclusions is to be construed reasonably and cannot mean it was proposed that a number of these acts should be literally put into Section 53. That statute does not begin to have words enough to accomplish any such inclusion. Besides, if it were intended to literally preserve all that was to be "included in Section 53," there was no need for enacting that section. If it were to be merely a transcript of all pre-existing statutes *in pari materia*, those could be read where they were on the statute books already.

It was not intended by any inclusion to retain all that existed prior to Section 53, and to give each and all a general application; nor to make the rule of said Arkansas special act general by permitting a transfer for both indictment and trial to all defendants, even if they were not confined in Fort Smith, were able to give bail, and did not desire to plead guilty. There could not have been any literal inclusion because some of the acts said to have been included permitted a transfer for the purpose of indictment, while others, like the act construed in the *Post* case, forbade it. All of which sums that what Section 53 did was to merge all pre-existing statutes *in pari materia* in the sense of permitting to all defendants the right to move for a transfer out of the division of commission, and to fix as to all where indictment might be returned and prosecution had. In a word, what Section 53 comes to is to provide a general rule, and the only general rule, covering the place of prosecution, including the place of indicting. It was not intended to inject a number of statutes, some of them clashing with each other, into Section 53, but to harmonize all of them by providing a single general rule on the subject that those various statutes dealt with.

Despite the *Biggerstaff* decision, the indictment at bar is made a nullity because of Section 53 and hence cannot base a removal.

Grand Division IV.

There Is No Jurisdiction to Remove to the Southern Division of South Dakota, Because the Indictment Was Not Found in That Division, and Transfer to It Was Made on the Application of the Government, Though Section 53, Judicial Code, Makes No Provision for Transfer Except on Application of the Defendant.

The application to transfer was made by the Government (10-342; 77, 342). Section 53 has the only transfer provision. As said it permits transfer to be made on application by defendant.

Power to transfer and division jurisdiction depend upon express legislation. *Barrett,* 18 Sup. Ct. 327, 429, 169 U. S. 218; *Rosecrans,* 17 Sup. Ct. 304, 305, 165 U. S. 257; *Dwyer,* 170 Fed. 160, 164. Section 53 is such legislation.

Where the jurisdiction is statutory it must follow the statute and jurisdiction may not be had on consent actually made, or constructively implied by estoppel. *Gastonia* v. *Well,* 128 Fed. at 373.

Whatever power to transfer exists is given by Section 53, Judicial Code, and it has but one provision as to transfer. That provision is: The prosecution shall be had within the division where the offense was committed, "unless the court or judge *upon the application of the defendant* shall order the cause to be transferred for prosecution to another division of the district."

It is the theory of the law that there is no prejudice against the Government in any place in its territory. It follows that unless there be an express permission the

Government cannot have a transfer that amounts to a change in the place of trial. It follows in turn that, of course, it has no such right under a statute which while it permits a transfer, permits it to the defendant only. Of course, the grant of the right to order a transfer imposes all limitations on the grant. That is certainly so as to divisions created by statute, whatever may be true of court rule divisions made purely for convenience of place wherefrom to get jurors and witnesses. *Sutherland,* 214 Fed. at 324.

It follows that any use of the grant without regard to the limitations upon its use is as unauthorized as acting in the absence of grant would be.

While Section 53 permits transfer on stipulation in civil causes, in criminal causes the transfer must be invoked by the application of the defendant. Rose, Juris., Sec. 282. Indeed the statute *says* the order must rest on such application. When transfer is ordered without that application, manifestly, the letter of the statute is disobeyed. Its spirit as well. For the provision is for the convenience of the defendant and in the nature of a method of giving effect to the Mandate of the Constitution that *defendant* may demand a speedy trial.

And when there is a transfer except on application of defendant, more than Section 53 is disobeyed. There is disregard, too, of the elementary law rule that jurisdiction of federal courts is presumed against, that their powers depend upon grant, and in that sense are courts of limited jurisdiction, and that when they act contrary to either the Constitution or the *laws* of the United States, they lack jurisdiction. And there is disregarded the equally elementary rule that power to transfer and division jurisdiction depend upon express legislation. *Barrett,* 18 Sup. Ct. at 327, 329, 169 U. S. 218; *Rosen-*

crans, 17 Sup. Ct. at 304, 305, 165 U. S. 257; *Dwyer*, 170 Fed. 160, 164. And Section 53 is such legislation.

The *Biggerstaff* case which is much pressed by the Government asserts that a certain Arkansas act is "included" in Section 53. We do not understand just what is meant by using the term "included," in this connection. But be that as it may, this act gives a named class of prisoners the right to move for a transfer. But as these prisoners were *defendants* the claimed "inclusion" of said act does not give the Government power to have a transfer, because said act gives the transfer only on application made by *defendants*.

It is the theory of the Government and of the *Biggerstaff* decision that when an indictment is returned in one division of a district there may be a transfer to any other division in that district. And whatever else may be claimed for Section 53, it makes no limitations as between divisions, so far as transfer is concerned. What it permits is a transfer "to another division of the district." Assume for the sake of argument that where a letter is mailed in one division and delivered in another then either division is the division of commission. But in South Dakota with its four divisions that still leaves one division in which the offense was not committed, on any theory. If there may be a transfer on motion of the Government and to any division in the district, then Section 53 makes it possible to send a case for trial on the motion of the Government to a division in which the offense was not committed. In other words, if the theory of the Government is sound then the command of Section 53 that the prosecution, even if that means trial, shall be had within the division of commission might be nullified at any time on the motion of the Government.

It is debatable, to say the least, whether the court can,

with the statute silent, order a change of place of trial on motion of the prosecution. 12 Cyc. 242, 243; *Sutherland*, 214 Fed. at 323. But be that as it may, it has no power to make such order on such motion when the statute says it must be done, if at all, on application of the defendant. And lacking the power to do what here was done, it follows *habeas corpus* should have interfered with removal for trial at Sioux Falls. Any other view must overlook that the federal courts act without or beyond jurisdiction whenever they do in one way what the statute expressly commands to be done in another way. *Habeas corpus* lies to stop a removal where the demand is based on an act without jurisdiction. Jurisdiction is lacking when the act done is in violation of a law of the United States. And, of course, Section 53 of the Judicial Code is such a law.

The only thing besides the application for and the order of transfer shown by the record is the immaterial recital that the Government presented the application in open court, in presence of defendant Sawyer "and their attorneys."

It makes no difference if the application was made in the presence of Sawyer or anyone else. It is not a question of remaining silent when the Government makes an application, but a question of whether there is any authority to do anything in Sioux Falls on a transfer made on the application of the District Attorney, where the statute provides for no transfer except on the application of the defendant. Sitting by when the Government makes an application is not the making of an application by the *defendant.*

So far as the point in consideration is concerned it is immaterial whether the Government or the petitioner is

right as to where indictment must be returned. If, there was no authority to indict in the Deadwood division, then there is no jurisdiction because of that fact. If return of indictment there is authorized, then a transfer to the Sioux Falls division is without jurisdiction, because the statute does not authorize such transfer on the application of the Government.

In any view then, the action below was erroneous. In no view was there a right to remove to Sioux Falls.

It is not amiss to add some statements that are relevant even though they do not bear directly on the main point of this division. Whatever is said in *Barrett's* case, 169 U. S. 218, 18 Sup. Ct. at 327, and *Rosencrans'* case, 165 U. S. 257, 17 Sup. Ct. at 304, 305, to the effect that the court has a discretion to order some transfers, of course, applies only to the statute law existing at the time of decision. Section 53 was at that time not yet enacted. The *Rosecrans* case is illustrative. It decides that *in the absence of express prohibition of such transfer as was made,* a transfer is sufficiently in discretion so that complaint of it may not be first made on appeal.

Grand Division V.

The indictment states no fact to support the conclusion that the alleged mailing of the letters was the joint act of the three defendants; nor any fact to support the conclusion that the letters were mailed in execution or attempted execution of the alleged scheme—and it shows affirmatively that none of these letters were written in aid of the said scheme. (See 39-46.)

All the indictment at bar has in addition to setting forth the letters is:

"Defendants so having devised * * * the aforesaid scheme to defraud, did * * * in and for executing said scheme and artifice, and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice, and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail," etc. (22-342)

Each of the fourteen counts of the indictment concludes with this paragraph:

"That at the time of the placing and causing to be placed the said letter in the Postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice." (342, pp. 23, 25, 27, 29, 31, 32, 33, 35, 36, 37, 38, 39, 41.)

The indictment states no fact to support its naked conclusion that "defendants deposited and stamped and caused to be delivered, etc." It should have set forth some fact showing joint action, and it does not. Assuming for the sake of argument that causing delivery by mailing a letter can be a joint act (and it was significantly hinted in the Stewart case (C. C. A.), 119 Fed. at 95, that the deposit of a letter might not be a joint offense) yet, as said, no facts exhibited show a joint act. The letters signed and ex-

hibited, assuming they are truly set forth, have no joint signatures; nothing in them shows them to be a joint production; nothing is set forth to show joint action in causing their delivery. There is nothing but the conclusion that "said defendants * * * did cause to be delivered by mail" (a described letter). There is no charge of conspiracy, and therefore no attempt to bind any defendant by the acts of any of the others, as by a partnership in a criminal enterprise.

Such charge of joint action cannot be permitted to take the place of a conspiracy count. It would enable the Government to charge one defendant with the acts of each of the others and yet escape what must be proved if conspiracy were charged, to wit, to prove the additional element, that it was part of the scheme to promote it by the use of the mails. One cannot imagine why there should ever be a conspiracy count, as there nearly always is, if by charging joint action as is here done the benefits of the conspiracy count may be had without assuming the burden of charging the conspiracy.

As is shown in several other places in this argument no material fact can be efficiently stated by way of naked conclusion. (See 39-46.)

Part 5-a.

EVEN AS THE ALLEGED JOINT ACTION MAY NOT BE STATED BY WAY OF CONCLUSION ONLY, NEITHER WILL SUCH CONCLUSION SUFFICE TO CHARGE EFFICIENTLY THAT THE LETTERS WERE MAILED IN AID OF THE ALLEGED SCHEME (WHICH MAILING IS THE GIST OF THE OFFENSE).

As said, the effect, or, rather the lack of effect, of naked conclusions is elsewhere fully dealt with. At this point we submit the case law that deals specifically with conclusions directed to the charge of mailing letters in execution or attempted execution of the alleged scheme.

Part 5-b.

THE MAILING IN EXECUTION OR ATTEMPTED EXECUTION OF THE SCHEME BEING THE VERY GIST OF THE OFFENSE, THAT ESSENCE OF THE OFFENSE MAY NOT BE CHARGED, AS IS DONE HERE, BY ASSERTING SUCH MAILING BY MEANS OF A NAKED CONCLUSION, WHICH RUNS COUNTER TO THE LETTERS EXHIBITED—AND AN INDICTMENT SO CHARGING WILL NOT BASE REMOVAL.

We show elsewhere how ineffective naked conclusions are. We now add law on that point addressed specifically to conclusions as to the execution of a scheme.

The charge is that mailing was done in and for the purpose of executing or attempting to execute the alleged scheme (22-342) and that, when mailing, defendants knew that what was mailed was mailed for that purpose (23-342).

Not the scheme, but a mailing in its aid, constitutes the violation of Section 215.

The *Olsen* case (C. C. A.), 287 Fed., at 89, construes Section 215, as amended. It follows the *Lemon* case (C. C. A.), 164 Fed. at 957, and holds that the "mailing" in execution or attempted execution of the scheme, "is the gist of the offense denounced by the statute, and that it is that act and it alone that confers jurisdiction upon the courts of the United States to punish authors of fraudulent schemes."

In *Francis* v. *United States,* C. C. A. 152 Fed. at 156, it is said that it will be noted that in *In re Henry,* 123 U. S. 373, 8 Sup. Ct. 142, followed *In re De Bara,* 179 U. S. 320, 21 Sup. Ct. 112, it was held:

"The act (Section 5480) forbids, not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or taking out of such a letter or packet from the post office in furtherance of such a scheme."

That is also ruled in *Badders,* 240 U. S. 391, as to Sec. 215 as amended.

In the case of *In re Henry,* 123 U. S. 373, 8 Sup. Ct., at 143, it is declared the district judge well said that:

"The act forbids, not the general use of the post office for the purposes of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office, in furtherance of such a scheme." To like effect is Horn 182, Fed. 727.

In *Marrin* v. *United States,* 167 Fed. 955, it is ruled:

By Section 5480, by which the use of the mails in a scheme to defraud is made a crime, it is the depositing in or the taking out of a letter, pursuant to such scheme, that is the offense; or, in other words, it is not the scheme, but the acts done under it, that are the concern of the law. *In re Henry,* 123 U. S. 373; *In re De Bara,* 179 U. S. 320; *Francis* v. *United States,* 152 Fed. 155 (C. C. A.)

The gist of the offense is the criminal use of the mails of the United States.

Horman (C. C. A.), 116 Fed. 351, citing Jones, 10 Fed. 469.

And the question whether an offense against the laws of the United States is charged goes to jurisdiction. If no such an offense be charged, then all jurisdiction to commit defendant for removal is at an end (*Tinsley,* 205 U. S. 20, 27 Sup. Ct. 430; *Morse,* 287 Fed. at 910).

One concrete application is that *habeas corpus* will lie if the indictment fails to charge an offense under the laws of the United States.

Ex parte Hyde, 194 Fed. at 211.

So, Federal law does not prohibit the devising of fraudulent schemes. It takes hold only if in execution or attempted execution of such scheme the post office establishment is used. That being the essence of the violation of 215 Penal Code, the accusation that the

mail was used for such purpose cannot be stated by way of naked conclusion. Time and again have the courts considered whether the letters involved were or were not intended to be an aid or attempted aid to such scheme. If a naked conclusion that they were, overcomes the letters themselves there was no occasion for such consideration. (See *Stokes,* 157 U. S. 187, 15 Sup. Ct. at 619), and *Stewart* (C. C. A.), 119 Fed. at 95. If the nature of the letters be an immaterial consideration and the conclusion that they were a help or intended help for the scheme, suffices, there was no occasion for such holding as is found, say, in *Lemon* (C. C. A.), 164 Fed. 953, which rules:

"It is imperatively required that a letter mailed should be one claimed or designed to aid or assist in the execution or attempted execution of a scheme already devised."

If such naked allegations suffice there was no occasion to consider whether the conclusion was supported by the letter, or to declare, as was done in *Tillinghast* case, 225 Fed. at 233, 23, that they were not. If the naked conclusion suffices, it is hard to account for the universal practice of setting out the letters in support of the conclusion.

The most that the Government can claim is that the conclusion suffices if the letter does not negative the conclusion. It should not be claimed that the opinion of the pleader is to prevail where the letters show on their face that they could not be and were not intended to be an execution or attempted execution of the scheme. A very clear statement on the point may be found in *U. S.* v. *Ryan,* 123 Fed. at 636:

"Do the letters set out in the indictment, or any of them, show that they were in any way necessary or intended by the parties as a part necessary to carry out the fraudulent scheme contemplated by them?"

In that case the conclusion was, that "a mere glance at the contents of the letters show they were not part of the fraudulent scheme."

Part 5-c.

AS TO HOW STRICTLY THE GIST OF THE OFFENSE—THE MAILING IN AID OF THE SCHEME—MUST BE PLEADED.

It is an established rule that the execution or attempted execution must be charged with more particularity than is required as to the scheme; that the scheme "need not be pleaded with all the certainty as to time, place and circumstances requisite in charging the gist of the offense, the mailing of the letter in execution or attempted execution of the same" (of the scheme). *Gardner* (C. C. A.), 225 Fed. 578, citing *Colburn,* 223 Fed. at 590; *Gould,* 209 Fed. 730; *Brooks,* 146 Fed. 223; *Lemon,* 164 Fed. at 953, and *Horn,* 182 Fed. 721. The *Gould* case, 209 Fed. 730, holds precisely what the *Gardner* case does. The *Gould* case is approved in *Mounday* (C. C. A.), 225 Fed. at 966, and the *Mounday* case cites the *Brooks* case, 146 Fed. 223, the *Lemon* case, 164 Fed. 953, and the case of *Hyde,* 198 Fed. 610. And the *Spear* case, 288 Fed. 487, is to the effect of the Gardner case.

As seen, it is settled law that the mailing and not the scheme is the gist of the offense, and numerous decisions rule that whatsoever *is* the gist must be pleaded. As is said in the *Gardner* case, "with all certainty as to time, place and circumstances." *Bowers,* 244 Fed. 643; *Horman,* 240 Fed. 196; *Ryan,* 123 Fed. 636; *Long,* 68 Fed. 348.

The essential fact that the letters are such as that they may in reason constitute an execution of or an attempt to execute the scheme devised may not be es-

tablished by charging by way of conclusion that the letters were of that character. Whether they are, is matter of judicial investigation—an investigation whether the acts charged to be in execution of the scheme are that. *Stewart* v. *U. S.* (C. C. A.), 119 Fed. at 95.

In the *Cruikshank* case, 92 U. S., at 558, it is held that "one object of the indictment is to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone." And these facts must be stated:

"So clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the laws, the facts there stated are sufficient to support a conviction." *United States* v. *Hess*, 124 U. S. 483, 486, 487; *United States* v. *Post* (D. C.), 113 Fed. 852.

We find the same doctrine in a decision wherein removal was denied on *habeas corpus*, to wit, the case of *Tillinghast*, 225 Fed. 226.

The *Tillinghast* case deals with the question whether the acts in execution set forth may be said to be relevant to the conspiracy charged. The conspiracy was one to deprive the United States of sums of money, and the decision declares that no innocent step toward the creation of a new right in the United States to receive sums of money can be regarded as an act "to effect the object of depriving the United States of that money"—all of which spells that the court will investigate whether what is alleged to be in execution of a scheme is in fact such execution or attempt to execute. It is declared that the alleged plot must be looked to "in determining whether an alleged overt act is in fact an act to effect"—that the acts set forth do not directly or by inference show that they were intended to effect the plot—and further "cannot support a finding of prob-

able cause"; that "certainly it should be made to appear by the allegations of the indictment that there was a connection between the act done and the planning" (230); that the constitutional right to be tried in a place where the offense is committed cannot be impaired "upon any arbitrary statement that an act was done in pursuance of the plan and to effect the object of that plan when nothing in the nature of the plan or act done or object alleged shows to the court the relevancy of the act to the preconceived plan or the object of that plan" (232); that an allegation of overt acts is "entirely too uncertain where it does not enable the court to attribute it to a relevant conspiracy; that it is for the court to say whether the object alleged is effective to accomplish that object" (229), and that "the object defined as the purpose of a criminal plot * * * must be looked to in determining whether the alleged overt act is in fact an act to effect it" (230).

Again—

"But surely, if an indictment may be so loosely framed that the Court is unable to see that the act alleged to be done was in the relation of cause and effect with a thing planned, then it may be called upon to base a fiction that one who is really absent is legally present upon an isolated fact having no apparent tendency to effect the object of the conspiracy, upon faith in the pleader's bare allegation that it has such connection. This is not permissible for the question of relevancy is to be determined by the Court upon facts alleged, and not by the pleader's opinion." (232).

Further—

Whether or not it is possible to frame any indictment setting forth an extensive plan which could make the purchase of oil and like commodities used in oleomargarine an overt act or step towards defrauding, yet under well settled rules of law an indictment charging a plan to defraud the United States will not warrant a removal where "it contains no averment of anything

which can amount to an overt act done in the district where the indictment is returned, to effect the purpose defined by the indictment" (at 233, 234).

The court recognizes that there seems to be considerable authority for the assertion that it need not appear upon the face of the indictment in what manner the act described would tend to effect the object of the conspiracy, and to the effect that if any act is set forth and is alleged by the pleader to have been done pursuant to the conspiracy or to effect its object, this is enough, though there is no apparent connection between the overt act and the object. But it holds that since the decisions in *Hyde's* case and in *Brown* v. *Elliott*, 225 U. S. 392, the line of decisions referred to above and cases that have followed it are of doubtful authority. And it is said:

"This seems unsound in principle, for relevancy is for the Court and not for the pleader. If an act must be qualified by circumstances to make it relevant, it should be pleaded, not simpliciter, but with these circumstances which make it relevant" (230).

Part 5-d.

ASSUMING FOR THE SAKE OF PRESENT ARGUMENT THAT JOINT ACTION IS EFFECTIVELY CHARGED, WE NEXT SUBMIT THAT EVEN IF IT BE ASSUMED THAT EACH DEFENDANT IS RESPONSIBLE FOR THE LETTERS ALLEGED TO HAVE BEEN MAILED BY EITHER OF THE OTHERS, THERE IS NOTHING IN ANY OF THE LETTERS THAT OFFENDS THE STATUTE.

Each of them shows affirmatively that it deals with a finished transaction; that if mailed, it was when the addressee had already been defrauded, if defrauded at all. In other words, the mailing of the letters does not offend the statute, because a letter that deals with a completed transaction is necessarily not an attempt to execute or

the execution of a scheme. There can not well be an execution or attempted execution of what has already been executed.

In the *Stewart* case (C. C. A.), 119 Fed. at 91, 92, 95, the scheme was to cheat those who would bid on a "fake foot race." Defendant proposed to Davis that the latter make a bet with Ellis and told Davis that Boatright would furnish the money, allowing Davis commission on the winnings; then defendant introduced Davis to Boatright and to one Stewart; the latter represented to Davis that Boatright was a responsible business man—thereupon Davis made a bet of $4,400 that one Gillett could beat one Stansbury. Boatright gave Davis the money for this bet and Boatright was made stake holder, and in that capacity at once received the money back from Davis. Next, Boatright represented to Davis that the former had no more money to wager but stated to Davis that if the latter would lend $5,000, Boatright would wager that further sum upon the result of the proposed race. Davis agreed to make this loan on condition that it should be refunded and drew a sight draft for $5,000 making the draft payable to Stewart, who sent the draft by mail to the drawee bank and requested the forwarding of the proceeds. After this letter was mailed Boatright made a pretended additional bet in $5,000 with the money he had borrowed from Davis. The day appointed for the race arrived before Boatright had refunded this loan. Gillett fell down in this race and claimed to have sustained some injuries. Thereupon it was agreed the race should be run over as soon as Gillett recovered from his pretended injury—and the agreement to so postpone the race was made to keep Davis from stopping payment of the draft he had drawn.

It is ruled to be of controlling importance that the letter involved does not seem to have been written to

accomplish the scheme to defraud, and that being so, it can hardly be said to have been deposited in the mail to make effective the alleged scheme, for in that it was written long after Davis had been induced to make a bet and had sustained all the loss he could possibly sustain by reason of the alleged fraudulent scheme. And that the letter is as matter of law neither the execution of or an attempt to execute the scheme alleged.

Another observation to be made concerning the indictment is this: That while the fraudulent scheme, as described, was one whereby the mails were to be employed to induce persons to come to Webb City, to be afterwards defrauded, yet the letter which was deposited in the mails by Gillett, on which the third count is founded, does not seem to have been written to accomplish any such purpose, and for that reason it can hardly be said to have been deposited in the mail in execution of such a scheme as the indictment describes. It was written, as it seems, long after Davis had been induced to go to Webb City and after he had wagered his money and sustained all the loss that he could possibly sustain by the reason of the alleged fraudulent scheme.

Stewart, 119 Fed. at 95, 96.

In *Trent* v. *United States* (C. C. A.), 228 Fed. 650, the court dealt with a contention that the letter showed on its face the scheme had been fully executed and could not have been in aid of a scheme still afoot. It recognizes that if that were so, the case would be ruled by the *Stewart case*, 119 Federal, 89, but it differentiates and declares that the letter in the *Trent* case shows quite the reverse of what is claimed, and said:

"It was written to one of the accused by a local agent intrusted with the delivery of abstracts and deeds and the collection of the price from the purchasers, contained a remittance on account of collections, mentioned the number of deeds not delivered, asked for a plat of the city, so-called, showing the railroad, etc."

We now proceed to apply to the letters the tests sanctioned by the law.

The one in count 2 is addressed to one Will and signed Midland Packing Co., Fred C. Sawyer, President. It encloses certificates for stock already bought. This is true of one in count 10 addressed to Hartman, and signed the same way. These two letters are as follows:

"Enclose described stock certificate 50 shares common stock 'which you purchased from us' and asks return of the receipt for same in enclosed stamped envelope. The rest is that as Will no doubt knows the plant is now in operation and if he is in the city at any time 'we' trust we may have the pleasure of a visit from him and an opportunity of going over the entire project." (342-25.)

"Encloses stock certificate 'representing the stock which you recently purchased, together with receipt for same which return in stamped envelope.' Glad indeed to number him among their stockholders and appreciate the assistance he has rendered to their representative. Pleased to advise the progress of the plant at this time is very gratifying to the officers and trusts that if addressee is in Sioux City "they may have pleasure of having a visit with him and going over the entire project." (342-36.)

The one in count 4 and the one in count 5 is addressed "to all stockholders." One is signed Midland Packing Co., Fred C. Sawyer President. The other Midland Packing Co. They are respectively as follows:

"Encloses an editorial page and speaks approvingly of its saneness and candor; points out that every stockholder is a partner and should have the solicitude and interest of a partner and if it is felt matters need adjustment to come to the stockholders meeting that will be held in the near future and make his trouble known, and if suspicions have arisen from malicious rumors, to make investigation at that time, and as a business proposition and in fairness to the stockholders in the company should preserve rather than destroy that which is his." (342-28, 29.)

"Encloses pamphlet of by-laws; says what informa-

tion the pamphlet gives, also pamphlet issued by the Sioux City Chamber of Commerce which contains information and statistics about the different industries in and around Sioux City. Points out that the enclosures indicate what the business men of that city think about the Company 'in which you have invested your money' and that they are able to send one pamphlet to each stockholder. The pamphlet should be read very carefully because it has valuable information regarding 'the gigantic house in which you are financially interested and its success depends greatly upon the cooperation of its stockholders.'" (342-30.)

The one in count 3 is addressed to Groesbeck, and is signed Midland Packing Co., C. H. Burlingame, Treasurer. The one in count 6 to Shanard, and signed Midland Packing Co., Fred C. Sawyer, President. The one in count 9 is addressed to Anker, and is signed as is the one in count 6. The one in count 14 is addressed to Rowley and is signed Midland Packing Company, Fred C. Sawyer, President.

Each of these four letters deal with dividends, and three of them enclose checks for a dividend, and are respectively as follows:

"Letter of Groesbeck of recent date in which he inquires as to his dividend has been referred to the writer for answer: that your stock has now been issued for a year is evidence of your early faith in the institution and belief that after operations have commenced substantial profits might be made on the investment but because of the vast amount of money required in the operation of the plant, which is now enjoying a prosperous trade and the fact that all their money was needed for that purpose has caused the Board to pass a resolution. What is said of the resolution is in effect that further dividends be accrued up to July 1, 1920, and shall then become due and payable. The writer says the purpose is to enable the corporation to use all its funds in operation. Feels sure Groesbeck would agree it would be unwise to borrow money for operation when using their own money would bring greater returns and he trusts Groesbeck will agree that this is a wise deci-

sion; he asks his patience and judgment of the work being done 'because we feel confident that the prospects based upon the splendid business we have been enjoying since operation, will fully justify this conclusion.'" (342, 26-27.)

"Your 10 shares of preferred stock purchased on June 21, 1918, entitles you to 7% guaranteed dividend due and payable on June 21, 1919; pleased to advise that they have been fortunate enough to make sufficient legitimate profits to be able to pay this dividend at this time and encloses check for $70.00 and asks that receipt be acknowledged. It adds that addressee was among first purchasers of stock of the project. That despite war and labor conditions they hope to have the plant complete and running within less than a year's time from the commencement of actual building. They think this is an unprecedented accomplishment; they feel that the structure now nearly completed will be one of the finest packing houses in the west. Hope is expressed that Shanard will call upon them when in the city and look over the plant and if he will do this he will feel that the investment is one which has been justified and that in the future he may look for substantial returns upon his investment." (342-31.)

"Like the dividend letter to Shanard except that the dividend check is $175.00." (342-34, 35.)

"Your 20 shares of preferred stock have earned the Shanard dividend—the only difference is the dividend check is $140.00." (342-40, 41.)

Coming to the ones alleged to have been written by defendant Salinger, and to have been signed by him as vice president and general counsel, three gave assurances that a contract of some kind made by the addressee with Colby and Spellings would be carried out. Nothing whatever is said as to who either Colby or Spelling are, or that they are in any way connected with the Midland Packing Co. In two of them, nothing is said about what the contract referred to is about, and in one the most that is done is to state by strong implication that the contract referred to in that letter is

an agreement that the note of addressee will not be sold or negotiated or used as collateral pending its life. These letters are addressed respectively to Christianson, P. C. Peterson and to Peterson and Alfred Christianson, and each of them is alleged to be signed, Midland Packing Co. B. I. Salinger Vice President and General Counsel. The said three letters are counts 7, 8 and 13, and are respectively as follows:

"Referring to your sale of October 22, Spellings & Colby have advised us of this sale and of their promises made to you in connection with its resale and this is to advise you the company has been informed and thoroughly understands their promises to you and that your note will not be sold or negotiated or used as collateral pending its life." (342-32, 33.)

"Colby and Spellings have advised us of their arrangement with you which we thoroughly understand. You may be assured that the contract will be carried out."

"Colby has called our attention to the contract he has entered into with you and this letter is written to advise you that the company is fully aware of the contract entered into and of the conditions of Mr. Colby's agreement with you." (39-342.)

The letter in count 11 has the same signature and is addressed to Kimball and it is this:

"Thanks for his prompt attention and renewal to his note; acknowledges receipt of check for $225.00 interest; encloses cancelled note and assures of sincere appreciation of the confidence Kimball has shown in the project. The plant is practically ready for operation and 'we' feel that the future of the business is assured." (342-37.)

The letter in count 12 has the like signature, is addressed to Jensen and is this:

"Your note for $1,000 will be due January 15th, with interest at 6% from date. If you will advise to what bank you wish your note sent for collection same will be promptly sent." (342-38.)

The one in count 1. Dated March 31, 1920, to Martin Christianson, Viborg, South Dakota, is alleged to be signed Midland Packing Company, B. I. Salinger, Jr., Vice President.

"Acknowledges a letter from addressee of March 30; is very much pleased he wrote because the rumors that reached Christianson are entirely false. The Company is not in the hands of a receiver, has not been and there is no possibility of its so being; was based upon 'our' judgment that no profits could be made by so doing. For the rest the effect is that the business cannot be run to suit those who have nothing invested and that 'we' will be compelled to conduct the business along lines which are conceived will make the most profit to stockholders and not to conduct the business when there are no profits to be gained. The concluding paragraph is that the writer will be glad to see Christianson at any time at the plant and go over the matter fully with him. (23-342)

We respectfully submit that with the exception of the letters written about Colby and Spellings and the one to Jensen, each letter shows affirmatively that it deals with something that had already been executed.

As to the Jensen letter (342-38) it is in itself utterly innocuous and merely gives an option to have a note sent for collection if the payer desires that, and manifestly it, too, is addressed to one who had already bought his stock. The same appears from the letter to Kimball (342-37). As said before, the Colby and Spellings letters do not appear to have any relation whatever to a transaction by the Midland Packing Co.—at any rate, nothing about them as much as indicates that they were written to help the alleged scheme. Whatever indication they do have is that the addressee, if Midland stock is being referred to, had already bought his stock when the letter was mailed.

In not one of them is there any suggestion that the

addressee should buy more stock, or should do anything whatever to induce anyone to buy stock.

In *U. S.* v. *Ryan*, 123 Fed. 636, it is said:

"Do the letters set out in the indictment or any of them show that they were in any way necessary or intended by the parties as a part necessary to carry out the fraudulent scheme contemplated by them? A mere glance at the contents of the letters show they were not part of the fraudulent scheme."

It is unnecessary to dwell upon what the law is where the conclusion that they were mailed in execution of the scheme is not negatived—where, for all that the letters show, they may have been mailed with intent to aid the scheme.

We submit that in the present case we have letters which affirmatively show that the conclusion of the pleader is unsound. When it is all said, the *Tillinghast* case but rules that where the scheme charged is to obtain money, say, by false pretences no purpose to effectuate such a scheme is shown by a letter, say, that George Washington was the father of his country. Carrying it a step beyond, a letter could not have been thought to effectuate such a scheme where it appears on its face that, as here, it was addressed to those who had already been defrauded, if ever defrauded—letters to those who have already bought stock and in which not so much as a suggestion was made that they should buy any more stock or do anything whatever to induce some other person to buy stock. If fraud there was, these letters were written after the fraud had been fully accomplished—wherefore it must be held as a matter of law that they were not an execution or attempted execution of the alleged scheme to obtain money for stocks by false representations, promises, etc. (13-342)

Grand Division VI.

No Offense Is Charged Because There Is No Allegation as to the Value of the Stock Sold and Hence Nothing Setting Forth an Intent to Defraud.

On the authority of *Miller* v. *U. S.* (C. C. A.) 174 Fed. 136-38, there is no violation of Section 215 where the indictment fails to charge that the shares sold in pursuance of the scheme were not worth what was got for them. Said decision is based upon the elementary propositions that an intent to defraud is a vital element; that the indictment to charge an offense must set forth the necessary elements of the offense, and that where it fails to show that what was sold was worth less than was paid for it no intent to defraud is exhibited. Ordinarily, at least, it is true that one who obtains full value has not been defrauded, and whoever gives him full value did not intend to defraud him.

True, there are decisions which rightly hold it is immaterial that what was obtained was worth what was paid for it; but they do not affect the present case. They deal with misrepresentations as to the kind and nature of the thing sold, or with cases where one was induced to invest by misrepresentation as to what the thing invested in had cost the seller. Of course, where it is represented to a buyer that he is getting a Steinway piano, and he wants no other piano, then if what is delivered turns out to be a piano of different make, it is no answer that the piano actually sold was worth what was paid for it. The buyer had the right to refuse buying anything except the instrument he wanted; had the right not to buy even if something he did not want was worth what was charged for it. So of the other illustration. It is human nature to desire getting in on the ground floor.

Many a man will not buy if advised that the profit asked is in his opinion too great, even if the thing involved is worth the price asked. Therefore, in the eye of the law, there may be an intent to defraud where the cost price is misrepresented. In the illustration cases the fraud consists not in obtaining an improper price but in the fact that if there had been no misrepresentation no purchase would have been made.

Here, the charge is that false promises and representations induced the buying of stock and that so the purchaser was defrauded. It is not charged the buyer was told he was getting something other than Midland stock —and, in a word, no offense is charged because the indictment exhibits nothing to show fraud either intended or accomplished.

And, speaking to a case of mailing, in the *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 572, it is said to be the universal rule "that all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective—no essential element of the crime can be omitted without destroying the whole pleading." The case of *Britton,* 108 U. S. 199, 2 Sup. Ct. 530, 531, holds an indictment insufficient because, so far as the facts pleaded show, essential elements of the offense are not pleaded so that for all that is pleaded nothing is exhibited, except an act that in itself might be lawful. To like effect is the case of *Pettibone,* 148 U. S. 197, 13 Sup. Ct. 542.

It is said in *Post* v. *U. S.* 113 Fed. at 854:

"The principle that in criminal pleading there must be direct, positive and affirmative allegations of every point necessary to be proven is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged."

The *Morse* case, 287 Fed. 913, cites with approval from *U. S.* v. *Dowling,* 278 Fed. 630:

"The indictment should set forth accurately every ingredient of which the offense is composed * * * and the test is whether the indictment contains every element of the offense."

The courts of the Cherokee Nation "can only try for crime of murder when the person murdered is an Indian. * * * This jurisdictional fact nowhere appears on the face of the papers submitted to the Governor. The affidavit fails to show that either Johnson or Morgan were Indians. It does recite that Johnson was sheriff of Sequoyah district. He might have been such sheriff under the laws of the Nation if he were a white man and had been adopted into the Nation; and this recital does not necessarily show that the courts of that country had jurisdiction to try Morgan for killing him. The requisition recites that Morgan is a citizen of the Cherokee Nation. That does not of necessity show him to be an Indian, because he may become a citizen and still not be an Indian. In order to give jurisdiction it must appear that both were Indians."

Ex parte Morgan, 20 Fed. at 308 (extradition).

Grand Division VII.

The indictment violates the provision of the Constitution which requires it to be in such form as reasonably to apprise the accused of what he is charged with, and what he must do to prepare for trial.

In every way, the indictment at bar is more open to criticism than the one that was condemned in *United States* v. *Stewart* (C. C. A.), 119 Fed. 90, 92, 94. Of the latter, the court said:

"It should be further observed, concerning the indictment as a whole, that it is needlessly long and involved, and that it contains many redundant and immaterial allegations, which defects, when taken together, render it difficult to construe, and almost unintelligible. If it be an offense under section 5480 (U. S. Comp. St.

1901, p. 3696) to use the mails to induce persons to come to a certain place for the purpose of defrauding them by tricks and artifices to be devised after their arrival, then the indictment now under consideration might and should have been made much shorter, more explicit, and more intelligible. We are of opinion that it lacks that certainty of averment which should be found in an indictment or information, and that for this reason, if for no other, it ought to be quashed on a motion to that effect."

That the stricture in the Stewart decision is warranted here is demonstrated by the merest glance at the indictment.

To begin with its vital allegations are naked conclusions. We show elsewhere, that such will not make a good indictment.

It is alleged that the scheme was devised about the month of November, 1917, the exact date being unknown; that it was a scheme and artifice,

"to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, from the Midland Packing Company, a corporation thereafter to be created.

Also from certain persons named and divers others whose names are unknown, the latter being thereafter denominated victims.

A scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, from said corporation and said persons named by inducing by fraudulent representations, pretenses and promises, and by fraudulent artifices and devices "said victims, *as hereinafter more fully set forth*" so intended to be defrauded, to part with their money and property in the purchase of shares of stock in the said Midland Packing Company." (342)

Any attempt to make a complete analysis of the indictment would be of no value—when the analysis was finished it would still be no clearer than the indictment itself. That results from the fact that the indictment

so lacks coherence and clearness that a clear summation is impossible. For one thing, aside from exhibiting the fourteen letters, and in merely stating the scheme, it begins with a paragraph on the bottom of page 12 in No. 342 and ends with the first paragraph on page 42. It must suffice to say that time and again it makes the statement that it is setting the scheme forth "more particularly" by what is about to follow (13-342)—and nothing follows (14-342). It covers pages that precede with the statement that something was done "in fraud of the said corporation and victims," without statement of what was done. (16-342) It is filled with absolutely immaterial matters by stating things done that are in themselves innocent and undisputed, such as the amount of capitalization of the Midland Corporation and the nature and amount of the shares (13-342). It asserts an abortive attempt by an unauthorized agent to buy property for $250,000, and after showing that it was abortive, charges, as a basis for charging fraud, that the same property was later bought for a much larger sum (13-342; 1415). In other words, nowhere in the indictment does it appear that the property was ever bought for the lesser sum. It recognizes over and again that there is a difference between the scheme and acts done in execution of the scheme; but with allegations as to the scheme it blends inextricably allegations of acts claimed to have been done in execution. We repeat that it would be idle for us to expand this. We make the statement that the indictment is well-nigh unintelligible, that it is utterly and needlessly lengthy, confused and prolix, and that the effect is to deny the constitutional right to be informed of the accusation made in such manner as that one may prepare himself to meet it at the trial. Nothing we could add would be helpful. The court must analyze the

indictment for itself. No exhaustive analysis on our part would help, because no clear analysis can be made of a thing that is so worded as to be impossible of clear summation or analysis.

It is said in the *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 572, speaking to an indictment for mailing and with a preface that all material facts and circumstances must be stated and that no essential element of the crime can be omitted, that the statement

"must be made directly, and not inferentially or by way of recital; * * * as a foundation for the charge a scheme or artifice to defraud must be stated which the accused either devised or caused to be devised, with all such particulars as are essential to constitute the scheme or artifice and to acquaint him with what he must meet at the trial."

Chief Justice Marshall, condemning straining for constructive presence, inquired in the case of *Burr*, 4, *Cranch* at 490: "For what purpose are those provisions in the Constitution * * * which ordain that the accused shall be informed of the nature and cause of the accusation." And he insisted that those provisions were substantial guaranties. See *Tillinghast*, 225 Fed. 232 (which applies this in a removal case). In 4, Cranch, at 499 (*Burr* case), the court said:

"The Eighth Amendment to the Constitution has been pressed with great force and it is impossible not to feel its application to this point. The accused cannot be truly said to be informed of 'the nature and cause of the accusation' unless the indictment shall give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defense."

Grand Division VIII.

Not only is the indictment in such form as that it deprives the defendant of his constitutional right to be clearly advised of the nature of the charge against him, but according to Stewart's case (C. C. A.) 119 Fed. at 96, it is in such condition as that it should be quashed on motion. (See ..... in 705.)

We do not overlook the line of decisions to the effect that the writ will be discharged because such flaws as the indictment exhibits must be raised in the trial court by demurrer, motion to quash, or the like. We do not challenge these pronouncements except to say that they are irrelevant. It is undeniable that such direct attacks must be made in the trial court. It alone can eliminate the indictment by sustaining demurrer or motion. But that has nothing to do with the functions of the authorities who are called upon to act judicially in determining *in limine* whether an accused shall be removed. These authorities do not pretend that they can annul the indictment. But that is no reason for saying that they shall find probable cause to exist when their judicial inquiry convinces them that none does exist. In other words, when they hold there should be no removal because the indictment is demurrable or quashable, they merely hold that there is no justification for removal. That they cannot sustain demurrer or a motion to quash, affords no reason why they should send accused to a distant state when they believe that the hardship resulting will accomplish nothing—when they believe removal will be idle because they believe not only that there can be no conviction but that the indictment is in such condition that there will never be a trial. When they refuse to remove, the indictment still remains, and if ac-

cused should enter the district wherein the indictment is returned he can be proceeded against thereunder as if there never had been a declination to remove him. The question is not who may annul an indictment, but whether one who believes, for any good reason, that removal would be idle, should none the less, subject to the hardship of being removed—compel accused to attack an indictment which the removal authorities believe is vulnerable to such attack.

What would there be left of the requirement that the inquiry on removal should be judicial if those called upon to order removal must do so, although they believe either that there can be no conviction, or, more than that, that there never can be a trial on the indictment which is the basis of the removal sought. Justice Thayer in the *Stewart* case, 119 Fed., declares that the indictment there involved was such that it should be quashed on motion. Would he be acting judicially if he made an order of removal when he so regarded the indictment? If that were his duty his judicial function would consist in ordering removal when he was convinced that no probable cause existed, *i. e.*, that there never could be a trial.

In a word, sustaining an attack upon the indictment is one thing; refusing removal because it is believed that attack upon the indictment must be successful is quite another. Removal should not be ordered in a judicial proceeding when it is believed from the hearing that it will be idle to remove.

"The court can require that it be satisfied before" ordering his transfer to a different state for trial that there was evidence on which a jury might convict him in that state.—*Fowkes* (C. C. A.), 53 Fed. 16.

We do not agree with the insistence by the district attorney, on behalf of the United States, that if the indictment is insufficient it must be met by a motion to quash or some other appropriate proceeding in the court

in which it is pending, and whose action would be subject to review.—*In re Greene*, 52 Fed. 106.

There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending.—*In re Terrell*, 51 Fed. 214.

In the case of *Dana*, 68 Fed. at 897, it is pointed out that an indictment often if not usually does not state matters as they were proved before the grand jury, but pleads them according to legal effect,

"*i. e.*, as the district attorney may understand their legal effect. Legal inferences are often stated as facts; facts and law are indistinguishably blended * * * An indictment that appears on its face to be of this character cannot be deemed or treated as equivalent to a deposition or an affidavit of facts * * * and its form and contents forbid it to be so regarded. It must be taken by its statements altogether; and if taken as a whole it is contradictory on material points, it would become useless as an affidavit of facts, however well pleaded, and such indictment is therefore insufficient as a foundation for removal proceedings."

All of which spells that on the question whether removal should be ordered, it is a vital consideration that the magistrate acting in the removal proceedings believes it is idle to remove because of the condition of the indictment.

Be all this as it may, it is horn-book law that at the most the indictment is but *prima facie* evidence

whereon to order a removal. And it is thoroughly settled that while, by grace, the pleading is admitted as evidence, it may not escape the tests applied to other testimony. See the case of *Dana, ante.*

"Although the indictment may be treated as an affidavit, it is nevertheless to be judged by the same rules an another affidavit, and given weight only according to the nature and character of its averments and the facts and circumstances which it sets forth, if any, in a manner sufficient to warrant the conclusion of probable cause to believe the defendant guilty."—*Greene,* 100 Fed. at 943.

In a decision approved in *In re Dana,* 68 Fed. at 890, it was said:

"The allegations of the date of the conspiracy," says Judge Lowell, "involve the indictment in contradictions, which, if they are errors, must be corrected by evidence, and none is offered. The indictment itself must stand or fall, by its own dates. * * * It is, therefore, worthless as evidence of a conspiracy, just as an affidavit would be which contained such inconsistencies."

Beyond the jurisdiction, it may, therefore, be received as any complaint on information and belief would be received, and its sufficiency should be judged by the same rules. The question of probable cause, the magistrate must himself determine from all the facts ascertained by him. The judgment of a foreign grand jury is not to be a substitute for his own. If the narrative of facts contained in the indictment is clear, consistent, and unambiguous in showing the commission of the offense charged, I think it may be regarded as equivalent to a deposition of facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it; and as such, sufficient evidence for the issue of the warrant of arrest, under section 1014, when other evidence of the facts is not conveniently attainable; and hence it is also sufficient for commitment, if examination is waived, or when the averments of the indictment are not contradicted.—*Dana,* 68 Fed. at 896.

So in any view it becomes material that the indictment is confused and needlessly prolix and filled with naked

conclusions, because if that be its condition it affords no evidence of probable cause. It is equally true that if it leaves out some essential element of the offense or is, say, wholly duplicitous, it will not base a removal, if for no other reason than that such being its condition it is not competent evidence of probable cause.

The whole question is summed up in the statement of the court in the case of *Terrell*, 51 Fed. at 213:

"There is good cause for holding that this power (refusing to remove) should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or an *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it."

And despite indictment the judge may go into the whole case, if necessary, to enable him to determine whether the party should be removed to a distant part of the country.—*In re Wolf*, 27 Fed. 606, 608; *In re Dana*, 68 Fed. at 891.

Part 8-1.

THERE SHOULD BE NO REMOVAL ON AN INDICTMENT WHOLLY DUPLICITOUS.

From what has just been said it follows that whenever the condition of the indictment which is the only witness is such as that it is not a competent witness, removal must be denied. This would be true of an indictment which was wholly duplicitous. Or of one that failed to charge an offense by failing to state some essential ingredient of the offense. When the indictment is in that state the authorities acting in removal may presume that if removal were ordered defendant could not be convicted, because he could make an attack upon the indictment that would prevent him from being tried—which,

of course, would prevent his being convicted. In this aspect the essential point is that no removal should be ordered to accomplish an idle thing—that no one should submit to expense and burden of a trial for the chance of reversing conviction upon a direct appeal, if the authorities acting in the removal proceedings believe that under the law he should never be put on trial.

We have in another place argued the proposition that depositing a letter and causing it to be delivered are not two offenses; that, if they are assumed to be, for the purpose of giving South Dakota jurisdiction—then they are two offenses for all purposes; and hence the indictment would be duplicitous—and that it should not be presumed *for the pleader* that he intended to draw a duplicitous indictment. We now reach the point where we say that if the claim of two offenses be persisted in then this indictment *is* duplicitous, because both of these offenses, or rather asserted offenses, are charged in each and every count of the indictment. Following what was said before, we submit that if the indictment is not duplicitous, if mailing and causing to be delivered does not constitute two offenses, then the only offense is the mailing, and that was done in Iowa. But if on the other hand these two things do constitute distinct offenses, then, the indictment being duplicitous, one should not be removed for the purpose of being relieved from trial because of successful assertion in the trial court that the indictment is duplicitous.

All of which is respectfully submitted.

B. I. SALINGER,
Attorney for Appellant.

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sec. 3, Article 3, Constitution of the United States.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

Section 53, Judicial Code.

When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All means and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section. All *prosecutions* for crimes or offenses *shall be had within the division of such districts where the same were committed,* unless the court, or the judge thereof, *upon the application of the defendant,* shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded within said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall

be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division. (36 Stat. L. 1101.)

Sec. 215 Crim. Code, page 12796.

Using the mails to promote frauds; counterfeit money punishment for.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thou-

sand dollars, or imprisoned not more than five years, or both. R. S. Sec. 5480, as amended Act March 2, 1889, C. 303, Sec. 1, 25 Stat. 873. Act March 4, 1909, C. 321, Sec. 215, 35 Stat. 1130.

Sec. 1674, Compiled Statutes, 1916. (R. S. Sec. 1014.) Offenders against the United States, how arrested and removed for trial.

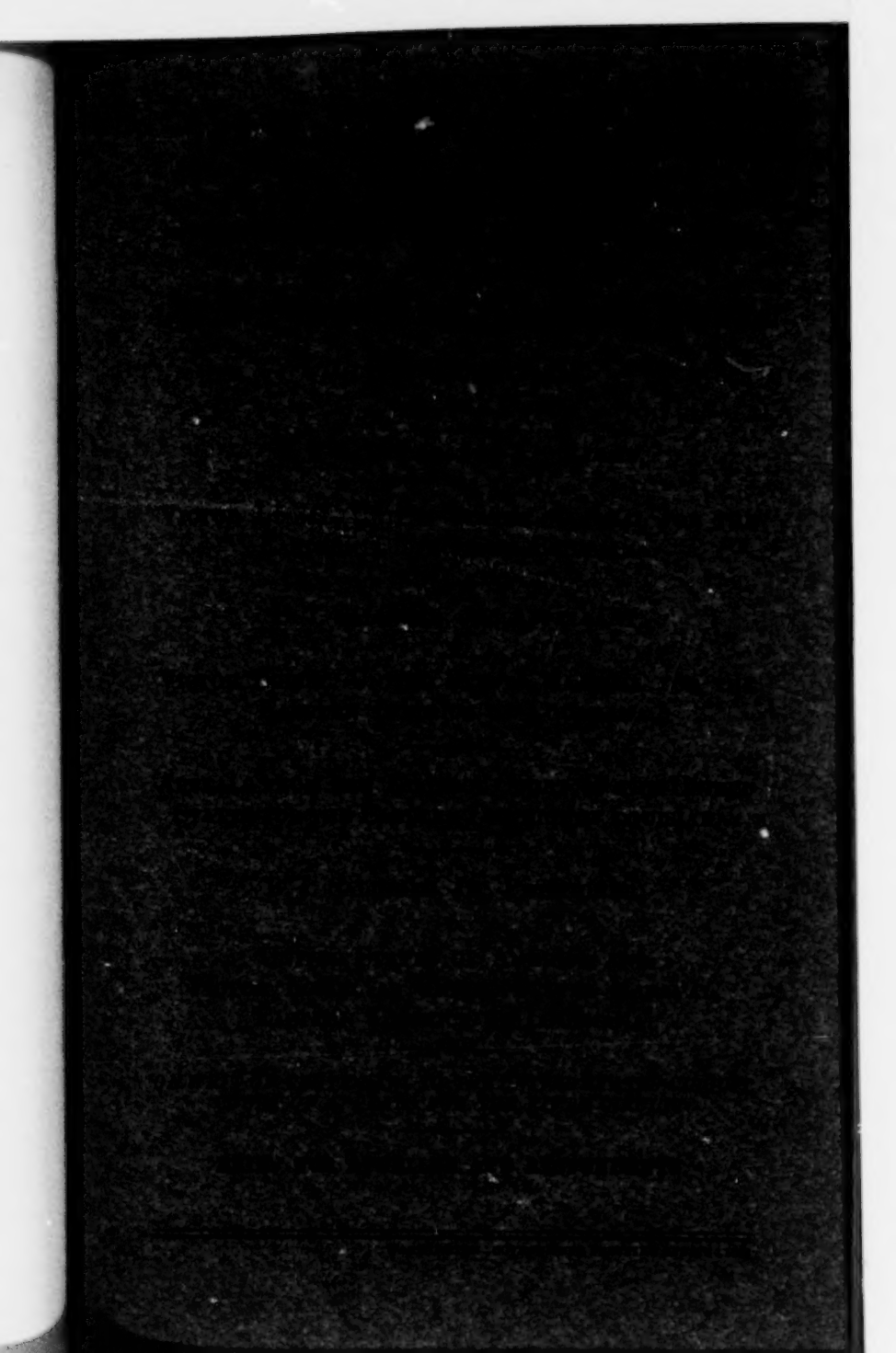
For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

Sec. 1682. (R. S. Sec. 1018.) Surrender of criminals by their bail.

Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

Sec. 1683. (R. S. Sec. 1019.) New bail to be given in certain cases.

When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.



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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

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B. I. SALINGER, JR., APPELLANT, *v.* VICTOR LOISEL, UNITED STATES MARSHAL for the Eastern District of Louisiana.	No. 342.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

B. I. SALINGER, JR., PETITIONER, *v.* UNITED STATES OF AMERICA AND VICTOR Loisel as United States marshal, Eastern District of Louisiana.	No. 705.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE APPELLEE AND RESPONDENTS.

On March 13, 1923, the Circuit Court of Appeals for the Second Circuit (*Ex parte Salinger*, 288 Fed. 752) affirmed an order of the District Court for the

Southern District of New York discharging a writ of habeas corpus and remanding Salinger, the appellant and petitioner in these cases, for removal under section 1014, Revised Statutes, to the District of South Dakota for trial upon an indictment theretofore found against him. The cases at bar are three phases of an effort made by Salinger in the city of New Orleans to defeat the order of removal made upon the mandate which followed that decision.

STATEMENT OF THE CASE.

On May 20, 1922, Salinger, who will be referred to as the defendant, with two others, was indicted by the District Court of the United States for the Western Division of the District of South Dakota for a violation of section 215 of the Criminal Code by using the mails to defraud. The indictment is set forth in the record in No. 341, beginning at page 9. In passing it is necessary to say merely that the alleged fraud was perpetrated through the sale of stock in a corporation called the Midland Packing Company. A bench warrant for his arrest upon said indictment was issued, and on the 13th day of June, 1922, he surrendered to a commissioner for the Northern District of Iowa and gave bond in the penal sum of $10,000 for his appearance before the District Court for the District of South Dakota on the third Tuesday of October, 1922, and he was thereupon released from custody. He failed to appear, however, his bond was forfeited, and a bench warrant for his arrest issued.

The Proceedings in New York.

On or about the 17th day of October, 1922, he was arrested in the Southern District of New York, and proceedings for removal were instituted. After a hearing at which he was represented by counsel who raised the same points afterwards urged in Louisiana, he was, on November 8, 1922, committed by a United States commissioner to await an order for removal. On the same day he sued out a writ of habeas corpus and writ of certiorari in the District Court for the Southern District of New York, and after a hearing the writ was quashed and the defendant remanded to the custody of the marshal for removal. He thereupon appealed to the Circuit Court of Appeals for the Second Circuit with the result that the order was affirmed (288 Fed. 752) and the mandate sent down to the District Court on the 14th day of March, 1923. Upon the receipt of the mandate, the District Court, on the 16th day of March, 1923, made its order of removal. Pending appeal the defendant had been given his liberty under a bond for $10,000, and upon the issuance of the order of removal upon the mandate of the Circuit Court of Appeals he appeared before the District Court and was allowed to give bond for his appearance before the District Court for the District of South Dakota in lieu of removal by the marshal. The bond was for $15,000 conditioned for his appearance before the South Dakota court upon the opening day of the April, 1923, term, the 3d day

of April, 1923. That bond was dated March 20, 1923, with the Southern Surety Company as surety.

The scene now changes to Louisiana.

THE PROCEEDINGS IN NEW ORLEANS, NO. 341.

On the 31st day of March, 1923 (11 days after he had given bond to appear in South Dakota, and 3 days before he was due to appear there), the defendant and one Parsons, an attorney at law of the city of New Orleans, La., appeared at the office of the United States marshal in the city of New Orleans, and Parsons—declaring himself to be attorney for the Southern Surety Company—introduced the defendant to a deputy marshal and stated that he desired to surrender him in behalf of his client, the Southern Surety Company.[1] Parsons thereupon withdrew.

The circumstances of the surrender, as set forth in the return to the writ of habeas corpus, were as follows (R. No. 341, p. 8):

> * * * that on the 31st day of March, 1923, petitioner herein and one Edward A. Parsons, an attorney at law, of the city of New Orleans, appeared at the office of respondent, at the Federal Building in the city of New Orleans,

[1] Section 1018. Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

and the said Edward A. Parsons, declaring himself to be attorney of the Southern Surety Company of Des Moines, Iowa, introduced petitioner to a deputy of respondent as one B. I. Salinger, jr., and stated that he desired to surrender petitioner to respondent in behalf of his client, the said Southern Surety Company; that the said Parsons withdrew and the said deputy states to the petitioner that he did not think he had any right to accept his surrender; that thereupon petitioner stated to said deputy that he was a lawyer and protested that the surety had a right to surrender him to respondent, and that any marshal of any district of the United States had the right to accept the custody of a bonded party when he was surrendered by his bondsman even though the party defendant had given bond to appear in a jurisdiction other than the one in which he might attempt to surrender himself; that while engaged in said controversy and argument, and without any act of restraint being imposed upon the petitioner, the commitment issued by Arthur H. Browne, Esq., in the form of the copy attached to the petition herein, was handed to the said deputy, whereupon, almost coincident therewith, the said deputy had received word from the office of the clerk of the United States District Court for the Eastern District of Louisiana to the effect that a writ of habeas corpus had been granted in favor of petitioner, the said deputy being requested by the said clerk, or one of his deputies, to repair to the clerk's office upon the floor of the Federal

> Building, immediately below that of the United States marshal's office; that pursuant to said request the said deputy, in company with petitioner, did immediately go to the said clerk's office for the purpose of being served with said writ, the petitioner, in the meantime—that is to say, before actually reaching the clerk's office—having paid the said deputy the sum of $2 in cash to defray the legal cost of service of said writ upon the United States marshal; that the said writ was then and there delivered to the said deputy, to whom there was presented coincident therewith a bond in the sum of $5,000, conditioned that the petitioner should appear before the United States District Court for the Eastern District of Louisiana upon the hearing upon the petition of said writ of habeas corpus; that upon examination of said bond by the deputy, and ascertainment that the same was in the amount as provided for by order of this honorable court, petitioner was thereupon released from custody. Respondent shows that the only custody and detention of petitioner was as above set forth, and that he does not now have the custody of petitioner.

The surety upon the new bond thus given was the Southern Surety Company, the same company which, a few minutes before, is said to have surrendered the defendant.

The writ of habeas corpus thus obtained is the one involved in the record in No. 341. To the petition for the writ an answer and return was filed, setting forth

the facts hereinbefore stated with respect to the indictment, the giving of the bond in Iowa, the forfeiture of the bond, the proceedings in New York, and the surrender of the defendant to the marshal in New Orleans.

THE PROCEEDINGS IN NEW ORLEANS, NO. 342.

On the 4th day of April, 1923, the District Court in South Dakota entered an order forfeiting the bond which the defendant had given in New York and issued a bench warrant for his arrest. On the 6th day of April, 1923, a complaint was filed with the United States commissioner in New Orleans by the assistant United States attorney, charging the defendant with being a fugitive from justice. He was thereupon arrested, brought before the commissioner, and admitted to bail in the sum of $15,000. On the 18th of April a hearing was had before the commissioner, evidence of identity of the defendant was produced together with a certified copy of the South Dakota indictment. The defendant offered no evidence, and the commissioner ordered him committed to await further action by the District Court in accordance with law, but provided that he be admitted to bail in the sum of $15,000 to appear before the District Court for the Eastern District of Louisiana on April 20. He did not give the bond but was committed to the marshal, and on the same day another petition for writ of habeas corpus was filed in the District Court, upon which he was at once admitted to bail which is the petition involved in No. 342.

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This petition asked for a writ of certiorari directed to the commissioner as well as for a writ of habeas corpus directed to the marshal. The marshal made return to the writ of habeas corpus, and the commissioner made return to the writ of certiorari, and on April 20, 1923, both proceedings came on to be heard before Judge Foster in the District Court. The defendant's counsel offered in evidence certified copy of the indictment and of an application for an order of transfer to the District Court of the United States for the District of South Dakota, Southern Division, and Salinger and his codefendants, Sawyer and Burlingame, testified orally that they were not physically present in South Dakota between June 1, 1919, and May 10, 1920, the period covered by the indictment. In behalf of the Government the testimony of the deputy marshal was taken, showing the circumstances of the defendant's surrender, and the following documentary evidence was introduced (R. No. 342, pp. 43–46):

> Certified copy of bond given by the defendant at Des Moines, Iowa, on the 13th day of June, 1922;
>
> Certified copy of the record before the Circuit Court of Appeals for the Second Circuit;
>
> Certified copy of an order of the District Court for the Southern District of New York dated March 16, 1923, upon the mandate of the Circuit Court of Appeals ordering the defendant to surrender himself into the custody of the marshal and ordering the marshal to

transport him to the District of South Dakota and deliver him there;

Certified copy of the bond given in New York on March 20, 1923;

Certified copies of various records of the District Court of the United States for the District of South Dakota.

Thereupon and on April 26, 1923, Judge Foster, in the District Court made orders that the alternative writs of habeas corpus heretofore issued be recalled, that the applications for a writ of habeas corpus be denied, that the petitions be dismissed, and that the defendant be remanded to the custody of the marshal.

THE PROCEEDINGS IN NEW ORLEANS, NO. 705.

The two proceedings, Nos. 341 and 342, were heard together by the court, and identical judgments were entered in each case. At the hearing on April 20 the United States attorney presented a motion praying for order of removal and submitted an order, and it was stipulated that the testimony taken in both cases should be used and deemed to have been taken on the application for warrant of removal. When on April 26, 1923, the court entered its judgments dismissing the petitions and remanding the defendant, it also filed an order of removal. This was treated as a proceeding separate from the habeas corpus proceedings.

The next day, April 27, the defendant presented to Judge Foster petitions for appeal to this court

in both cases, together with certain so-called assignments of error. These appeals were allowed and ordered to operate as a supersedeas upon the filing of undertakings. These undertakings were filed on the same day. However, on April 27, 1923, the defendant filed in the same court another petition for writ of habeas corpus based upon the order of removal and alleging that he was then imprisoned and that the warrant of removal was the sole claim and authority for his detention. He alleged the judgment of the court dismissing the two petitions, the allowance of the appeals notwithstanding which the court refused to stay the warrant of removal pending the decision of the Supreme Court of the United States upon the appeals. This is the petition which is involved in No. 705. To this petition return was made, and after a hearing and on April 28, 1923, the proceeding was dismissed and the defendant remanded to the custody of the marshal. From this judgment an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. The District Court refused to allow such appeal to operate as a supersedeas, but it was allowed by Circuit Judge Walker on April 30, 1923. This appeal to the Circuit Court of Appeals came on to be heard before that court on the 3d day of December, 1923, and was argued. After it was argued, and before it was decided, the defendant, on the 10th day of December, 1923, filed in this court a paper entitled:

> Petition or motion of B. I. Salinger, jr., for relief, in aid of his rights created by super-

sedeas and bail obtained in causes Nos. 341 and 342 of said term, and to stop interference with the jurisdiction of this court.

This petition, or motion, was served upon the Solicitor General about 10.45 o'clock in the forenoon of December 10, and of course there was no time to prepare an answer to it or to make adequate preparation to contest it. It is worthy of note that neither this petition nor any of the other petitions set forth the proceedings in New York culminating in the removal order to which defendant gave bond. The substance of the complaint made in that petition was that the courts below and the officials of the Department of Justice were attempting to deprive the defendant of the benefit of his appeals to this court. It was alleged that he had been arrested in the city of Chicago pending the appeals, but the present status of that proceeding does not appear. It was also alleged that an attempt had been made to arrest him in New York City. It was also alleged that the Circuit Court of Appeals in the Fifth Circuit, when the case came on to be argued before that court, made an order committing him to prison pending the determination of the cause, and that he was even then unjustly and unlawfully detained pursuant to the order of that court. Something was stated in the petition with regard to remarks made from the bench during the hearing by the Circuit Court of Appeals, and the defendant alleged in his petition "said remarks from the bench indicated that if there be an affirmance petitioner would not be enlarged

on bail, but would have to submit to immediate removal on the order of the District Court, and that he was being summarily imprisoned so there might be no possibility of further offense consisting of availing himself of the right given him by law to appeal to other courts as long as the order against him was one that he be remanded." He urged that he was unlawfully detained and restrained of his liberty and about to be deprived of the benefit of his appeals, and his prayer was that writs of habeas corpus, certiorari, injunction, or other lawful writ, be granted, to the end that the interference with the jurisdiction of the court herein complained of and any others may be prevented, and for such other relief or writ as may be proper in the premises. This court, on the same day, made an order granting a certiorari to the United States Circuit Court of Appeals, directing that all further proceedings by said court other than the announcement and delivery of the opinion by such court in such cause be stayed; that the defendant be admitted to bail pending the consideration and disposal of the cause by this court upon giving bond in the sum of $10,000 conditioned for his appearance and surrender pursuant to the ultimate order of this court, and for his obedience to that order and to any intervening order in the cause which this court may make, and further directing that the three cases be especially assigned for hearing on January 14, at the head of the call for that day. So the snarl is here to be untangled.

ARGUMENT.

I.

It was the obvious duty of the District Court in Louisiana to order the defendant's removal.

All this seeming complication presents, as we think, but one substantial question. All the rest is mere detail tending to confuse the real point. When Salinger and the alleged representative of the Southern Surety Company visited the office of the United States marshal in New Orleans and went through the form of surrendering to the marshal, there was outstanding an order of the District Court of the Southern District of New York, entered pursuant to a decision of the Circuit Court of Appeals for the Second Circuit, directing the removal of Salinger to the District of South Dakota. The right of the United States to this order had been tested by Salinger upon habeas corpus, and the judgment of the Circuit Court of Appeals overruling his contentions was final unless revised by this court on writ of certiorari. No application for certiorari was pending, nor has any such application been made, and the time to make it has long since expired. The order of removal was therefore based upon a final judgment, conclusive against the whole world and binding upon every court in this country, including this court. *Ex parte Watkins*, 3 Peters 193. In that case this court, speaking by Chief Justice Marshall, said, at page 202:

> This writ is, as has been said, in the nature of a writ of error which brings up the body

> of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment and reexamine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it.

The inquiry before the court in New York was whether Salinger could be removed under section 1014, Revised Statutes, for trial in South Dakota, and it had put an end to that inquiry by deciding it. Thereupon, Salinger gave bail in order to avoid physical removal by the marshal. Assuming for the purpose of the argument that the so-called surrender in New Orleans was regular and such as is contemplated by section 1018, Revised Statutes, the custody of the Louisiana marshal was the same as would have been the custody of the New York marshal had Salinger not given bail, and that was custody under the final judgment of removal. It is difficult to see what question was open for consideration by the Louisiana court.

But it said that an order refusing or discharging a writ of habeas corpus is not *res judicata* so as to prevent another application for the writ. In a general way this may be true. It is also true that the fundamental principle of *res judicata* applies in criminal cases (*United States* v. *Oppenheimer*, 242 U. S. 85) and that a judgment in habeas corpus proceedings discharging the prisoner may operate as *res judicata* of the issues of law and fact necessarily involved in that result (*Collins* v. *Loisel*, 262 U. S. 426).

The writ of habeas corpus, however, is applicable to many situations, and we have in removal proceedings a unique situation. Section 1014 of the Revised Statutes [2] provides merely a means of arrest, of bringing an accused person before the court in which a charge is pending against him. *Beavers* v. *Haubert*, 198 U. S. 77.

When arrested in a district other than that where the charge is pending, he may be imprisoned or may give bail. If he gives bail, he is not imprisoned.

[2] Section 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. *And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.*

of 1018 Revised Statutes. The provisions of that statute were complied with and the commissioner committed him to the custody of the United States marshal for the Northern District of New York. He then sued out a writ of habeas corpus. The court held that when, in the first instance, he waived examination and gave bail, he was thereafter entitled to no further examination, and said:

> But if the defendant contends that when he was surrendered by his bail, his being under bail being but a continuance of his original imprisonment, he was relegated to the same position and rights he held and had at the time he was held to bail by the commissioner and before he entered into the bond required. That he then had the right to refuse to give bail and to bring up the whole question of the validity of the holding of the commissioner by writ of habeas corpus before or at the time the order of removal was applied for and that, being now in custody, he has the same right. That he could not and has not waived that right. If this contention be true then defendants in these proceedings may indefinitely postpone and delay removal to the district where the indictment is found. The defendant when arrested and brought before the commissioner will waive examination. If held to bail he will give it and when the court at which he is to appear and answer is about to convene he will procure his bail to surrender him and then demand an examination and sue out a writ of certiorari and a writ of habeas corpus and compel the court to inquire into the legal-

> ity of the proceedings, including the validity of the indictment and the jurisdiction of the commissioner. If judgment goes against him and the writ is dismissed and a warrant of removal is granted he may appeal, and if the order dismissing the writ is affirmed he is entitled to then give bail for his appearance in the court where the indictment was found. When that court is about to convene he may procure another surrender by his bail and sue out another writ. Quite likely this writ will be dismissed, but in the meantime witnesses may die or go beyond the jurisdiction of the court and the administration of justice be greatly delayed if its ends are not wholly defeated.

We are not called upon in this case to consider whether or not the defendant had any right to a writ of habeas corpus after he had forfeited the bail bond which he gave in Iowa on June 13, 1922. The rights of his sureties on that bond have been stated by this court in *Cosgrove* v. *Winney*, 174 U. S. 64, quoting from *Taylor* v. *Taintor*, 16 Wall. 366, 371, as follows:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that can not be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sab-

> bath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In (*Anonymous*) 6 Mod. 231, it is said: "The bail have their principal always up on a string, and may pull the string whenever they please, and render him in their own discharge." The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and can not cast them upon the obligee.

It may possibly be true that bail given to an indictment absolutely void is itself void, but we have gone a step beyond that question, for the bond given to the United States District Court on March 20, 1923, was not given to a void indictment. The validity of that indictment for removal proceedings was not then open to question. The Circuit Court of Appeals had put an end to that inquiry by deciding it. *Ex parte Watkins*, 3 Peters, 193. The question had been litigated by the defendant upon writ of habeas corpus in a court of competent jurisdiction and decided, and that decision affirmed by a court whose decision was final. Therefore, when Salinger gave bail to the New York court in lieu of removal by the marshal, the bail itself was valid, and there was nothing left for any court in the United States to do, when he procured himself to be surrendered by that

bail, except to carry out the removal order of the New York court.

When he said, in his petition to the Louisiana court for habeas corpus, that the sole claim and sole authority by virtue of which the marshal restrained and detained him was a certain paper purporting to be a commitment, a copy of which was annexed to the petition, and that said commitment was issued by virtue of a certain indictment found against him in the District Court of South Dakota, he was, to say the least, not candid with the court. The marshal was holding him because his bondsman had surrendered him. The commitment which he had induced the commissioner to sign and which had obviously been drawn and attached to the petition before the form of surrender was gone through with, contained nothing with respect to the proceedings in New York, and it was an untrue statement that the commitment was issued by virtue of a certain indictment. The commitment was issued at the solicitation of the defendant because of the surrender. He had procured his own arrest to avoid fulfillment of his obligation under his bond. When the actual circumstances and facts of the case were revealed to Judge Foster, and he became aware of the deception that had been practiced upon him, and the abuse of the process of his court had been revealed, we can readily understand why he made the judgment which he did, recalling the writ which he had issued, denying application for the writ, and dismissing the petition. This same lack of candor has been practiced

from that time to the present. In no one of the petitions which the defendant filed in New Orleans did he set forth the facts respecting the removal order made in New York or the decision of the New York court. Nor did he set forth those facts in the petition which he filed in this court for certiorari. These cases, therefore, and all these proceedings narrow down to the single question, shall the removal order made by the court in New York be enforced—an order made by a court of competent jurisdiction in a proceeding tested by the defendant himself upon habeas corpus, reviewed at his instance by the Circuit Court of Appeals for the Second Circuit, whose decision is made by statute final? The only question for this court to decide is whether it is final or not. If it is not final, then no decision can be final, not even a decision of this court. The defendant has given bond to appear and answer the judgment of this court. If the tactics he has pursued may be tolerated, he can, if the decision be against him, go before some United States Marshal somewhere in the United States, surrender himself, secure a writ of habeas corpus if he can find a judge to give it to him, give a new bond and start the whole thing over again.

II.

The indictment.

Should the Court deem it necessary to consider the indictment upon this state of the record, the following considerations are pertinent.

The indictment is brought under section 215 of the Criminal Code which, so far as it pertains to the offense here charged, reads as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any postoffice, * * * to be sent or delivered by the postoffice establishment of the United States, * * * or shall knowingly *cause to be delivered by mail according to direction thereon*, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

The indictment was found in the District Court of the United States for the Western Division of the District of South Dakota. It was found as appears from the face of the indictment by grand jurors summoned "from the body of the district aforesaid" and charged to inquire and true presentment make for "said district of South Dakota." The indictment consists of 14 counts and, stated briefly, charges:

That the defendants organized the Midland Packing Company, an Iowa corporation, with a capital

stock of $3,500,000, afterwards increased to $8,000,000.

That the defendant, B. I. Salinger, jr., was vice president and general counsel of that company.

That the defendants bought a packing plant for $250,000 but caused to be issued stock of the par value of $485,000 therefor, delivering but $250,000 thereof to the vendors, and converted the difference to their own use.

That the defendants misrepresented the price paid for the property to the Executive Council of the State of Iowa in connection with an application to it for authority to issue its capital stock, and also to the South Dakota State Securities Commission for the purpose of securing authority from that commission to sell the capital stock in the State of South Dakota, and also to prospective purchasers of said stock.

That in order to secure subscriptions to the stock defendants declared and paid a dividend of 7 per cent at a time when the company was insolvent.

That defendants entered into arrangements with pretended subscribers which showed large subscriptions to the stock, which were false, the effect being to permit the paying of large commissions to themselves and to resell the stock so fraudulently subscribed to other parties. The defendants converted the difference to their own use.

That defendants at the time of making these and other false representations knew them to be false.

That in execution of the scheme the defendants caused to be delivered by mail in the Southern Division of the District of South Dakota letters and circulars which had previously been posted in Iowa for mailing and delivery to "victims" within the District of South Dakota.

The point which has been raised by the defendant here and in the court below and before the District Court in the Southern District of New York and the Circuit Court of Appeals for the Second Circuit is that the indictment was void because it was found by a grand jury sitting in the Western Division of the District of South Dakota and alleged an offense committed in the Southern Division of that district. That question was squarely presented to the Circuit Court of Appeals for the Eighth Circuit and a similar indictment sustained. *Biggerstaff* v. *United States*, 260 Fed. 926. That decision was followed by the Circuit Court of Appeals for the Second Circuit in the present case (*Ex parte Salinger*, 288 Fed. 752) and by the Circuit Court of Appeals for the Fifth Circuit in the decision just handed down in No. 705. Summoning the grand juries from the body of the district seems to be in accordance with section 277 of the Judicial Code, which section is applicable to grand as well as petit juries. *Agnew* v. *United States*, 165 U. S. 44. By section 53 of the Judicial Code it is provided that "all prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the

defendant, shall order the cause to be transferred for prosecution to another division of the district." After the indictment was returned the court ordered it transferred for trial to the southern division of the district. The order was made in open court in the presence of defendant's counsel, but he has urged from the start that this transfer was illegal because not made upon his motion, but it will be observed that the motion referred to in the portion of section 53 just quoted is a motion for transfer to *another division than that in which the crime was committed.* The order in the present case was for transfer to the division where the crime was committed.

This practice is approved by the Circuit Court of Appeals for the Eighth Circuit. *Biggerstaff* v. *United States*, 260 Fed. 926.

In the *Biggerstaff case* the offense was charged to have been committed in the Chadron Division of the District of Nebraska. The indictment was found and returned in the Omaha Division by a grand jury drawn from the district at large but thence transferred to the Chadron Division for trial. There was a demurrer to the indictment, which specified as a ground that the finding and return of the indictment in the Omaha Division was contrary to section 53 of the Judicial Code. In sustaining the indictment the court, by Circuit Judge Hook, said:

> The point made turns upon the meaning of the word "prosecutions" as employed in the statute; that is to say, whether a prosecution includes the inquiry of the grand jury and the

finding of the indictment. It was proper to draw the grand jurors from the district at large. *Clement* v. *United States*, 149 Fed. 305, 79 C. C. A. 243. And if the indictment was lawfully found in the Omaha Division, it was lawfully returned there, provided it was afterwards transferred to the proper division for trial. The return of an indictment is naturally made to the court and at the session where the grand jury is performing its functions. We think the term "prosecution," in this statute, means the proceedings which follow the finding and return of the indictment, and does not embrace the preliminary inquiry and the making of the accusation. Until the latter is done there is no case or cause against the accused to be prosecuted. While persons are sometimes held in bail or confinement to await the action of a grand jury, it is not always so. That is merely precautionary. It is the process on the indictment which brings them into court to answer the accusation. It does not necessarily follow that the proceedings of a grand jury are specially directed at the person finally accused. There may at first be no formal charge against any particular person. The probability of the commission of a public offense and of the identity of the perpetrator may not be disclosed until the conclusion of their investigations. Even the locality of the criminal act, whether in one division or another, may at first be in doubt. Except as to some fundamental requirements in respect of the constitution and conduct of grand juries, the persons finally

indicted are not entitled to subject their proceedings to the scrutiny and tests of a trial. *McKinney* v. *United States*, 199 Fed. 25, 117 C. C. A. 403. In *Blair* v. *United States*, 250 U. S. 273, 39 Sup. Ct. 468, 63 L. Ed.—, the court, in speaking of a grand jury, said:

"It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."

While the inquisition of a grand jury is essential, it is preliminary, and not a part of the definite prosecution of any particular individual. It is in this restricted sense that the term is used in the statute, though in other relations it may have a broader meaning. As confirmatory of this it will be observed that the same section also authorizes the court or judge, upon the application of the defendant, to "order the cause to be transferred for prosecution to another division of the district." Doubtless the same meaning was intended in both connections. It is the cause which follows the indictment that is prosecuted. Still further, in the copies of the Judicial Code prepared under the direction of the Judiciary Committee of the Senate

and published by authority of Congress, there is a note to section 53 which says of the provision we have last quoted:

"The purpose of this latter provision is to facilitate the early disposition of criminal cases, especially in minor cases, where the defendant is unable to give bail, and may, in view of the fact that in many divisions but one term of court is held each year, possibly be compelled to remain in jail nearly a year before a trial may be had or before an opportunity will present itself for him to plead guilty."

Manifestly this purpose might often be frustrated, where persons are confined in default of bail to await the action of a grand jury, if it were held that the proceedings of the grand jury, including the finding and return of an indictment, must be in the division in which the offense was committed.

The only decision of a Federal court holding contrary to the *Biggerstaff case* is *United States* v. *Chennault*, 230 Fed. 942. This was a decision by Judge Foster in the District Court for the Eastern District of Louisiana rendered January 26, 1916. This decision was rendered before the decision of the Circuit Court of Appeals in the *Biggerstaff case*, which, since it was made, has been accepted as establishing the practice. The fact that it was rendered by Judge Foster is a sufficient explanation of why Salinger sought the Eastern District of Louisiana as a forum in which to attempt to escape the decision of the Circuit Court of Appeals for the Second Circuit.

The other point made by the defendant in all the courts has been that under section 215 of the Criminal Code the only place where the crime could be committed was in the district in which the letter was mailed, and he has relied upon the case of *Stever* v. *United States*, 222 U. S. 167. The *Stever case*, however, involved a construction of 5480 of the Revised Statutes, which differs from section 215 of the Criminal Code by its omission of the very words upon which this indictment is based, namely, "cause to be delivered." Section 215, as it now stands, is not the section which was construed by the Supreme Court in the *Stever case*.

This precise question has been before the Circuit Court of Appeals for the Eighth Circuit and there decided adversely to the defendant. *Moffatt* v. *United States*, 232 Fed. 522. The decision in the *Moffatt case* was followed by the Circuit Court of Appeals for the Second Circuit in the present case (288 Fed. 752). As the latter court points out (p. 755), "the indictment in this case seems in form to be a mere copy of the Moffatt indictment." The following authorities are, by analogy at least, strongly against the contention of the defendant on this question: *In re Palliser*, 136 U. S. 257; *Benson* v. *Henkel*, 198 U. S. 1; *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392.

The indictment surely is sufficient to support a removal proceeding.

CONCLUSION.

The appeals in Nos. 341 and 342 should be dismissed for lack of jurisdiction. The only ground upon which any claim of jurisdiction by direct appeal from the District Court could be based is that a constitutional question is involved. No such question arises upon the record. The place to which these various attempts to remove Salinger for trial have been made is the State and district and division in which the crime was committed. Therefore, the provisions of the sixth amendment to the Constitution are satisfied.

The only question of jurisdiction is that of the South Dakota court. Such question does not give a right of direct appeal to this court. (*Pothier* v. *Rodman*, 261 U. S. 307.)

The only questions of construction are (1) the meaning of the word "prosecution" in section 53 of the Judicial Code, and (2) the meaning of § 215, of the Criminal Code. Such questions do not give this court jurisdiction of an appeal direct from the District Court. *American Sugar Refining Company* v. *United States*, 211 U. S. 155; *Sloan* v. *United States*' 193 U. S. 614; *United States ex rel. Taylor* v. *Taft, Secretary*, 203 U. S. 461. The point would seem to be much like that involved in the case of *United States ex rel. Mensevich* v. *Todd*, No. 148 of the present term, argued and decided from the bench on January 2, 1924. In that case the statute required deportation of aliens to be to the "country whence

they came." The order for deportation directed that Mensevich be returned to Poland. The place from which he came was, when he left it, included in Russia, but at the time the order was made it had become part of Poland. This court held that no constitutional question arose.

In the case of *World's Columbian Exposition* v. *United States*, 56 Fed. 654, Mr. Chief Justice Fuller, sitting as a circuit justice, said at page 667:

> Cases in which the construction or application of the Constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue upon such construction or application or constitutionality, the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws.

In No. 705, the cause should be remanded to the Circuit Court of Appeals with direction to that court to enter judgment in accordance with the opinion which it has rendered.

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